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IN THE

# Supreme Court of the United States

No. 74-934

STATE OF NEW YORK,

Respondent,

-against-

ANTHONY HUESTON, also known as TONY DE JEST and BONNIE KERR,

Petitioners.

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No.

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STATE OF NEW YORK,
*Respondent,*

*-against-*

ANTHONY HUESTON, also known
as TONY DE JEST and BONNIE KERR,
*Petitioners.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in the captioned case *sub nom.* the People of the State of New York v. Anthony Hueston, also known as Tony De Jest and Bonnie Kerr on the 2nd day of May, 1974, which denied petitioners' motion to suppress evidence obtained as the result of intercepted telephone conversations.

## CITATIONS TO THE OPINIONS BELOW

The opinion of the New York State Court of Appeals is reported at 34 N.Y.2d 118, ——— N.E. 2d ———,

and ———, N.Y.S. 2d ——— (Appendix A).

The opinion of the Supreme Court of the State of New York, Appellate Division, Second Department is reported at 42 A.D.2d 860, 347 N.Y.S.2d 78. (Appendix B).

The opinion of the United States Court of Appeals, Third Circuit is reported at 465 Fed.2d 1057. (Appendix C).

The opinion of the United States District Court, Middle District of Pennsylvania is reported at 326 Fed. Supp. 1038. (Appendix D).

The opinion of the County Court, Rockland County, New York is unreported. (Appendix E).

## JURISDICTION

The denial of the petitioners' motion to suppress evidence by the New York State Court of Appeals, dated May 2, 1974 and the denial of the petitioners' motion for a certificate granting leave to appeal to the Court of Appeals of the State of New York, dated October 30, 1974 is a determination by the highest State Court in which a decision could be had. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3), the petitioners claiming rights, privileges and immunities under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

## ISSUE PRESENTED

Whether the fruits of an eavesdropping warrant should be suppressed where the eavesdropping warrant contains a provision expressly waiving notice to the persons named in the warrant, contrary to the provisions of State and Federal

statutes, and where notice is not, in fact, served upon the persons named in the eavesdropping warrant.

## STATUTORY PROVISIONS INVOLVED

18 U.S.C. 2510 Definitions

* * * * * *

* * * * * *

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

18 U.S.C. 2511 Interception and disclosure of wire or oral communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who–

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) wilfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when–

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmissions of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial

establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. 2515 Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. 2517 Authorization for disclosure and use of intercepted wire or oral communications

* * * * * *

* * * * * *

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authorization of the United States or of any State or political subdivision thereof.

18 U.S.C. 2518 Procedure for interception of wire or oral communications

* * * * *

* * * * *

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specifically designated by the Attorney General or by the principal prosecuting Attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that–

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made

in accordance with this section within forty-eight hours after has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8) * * * * *

* * * * *

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7) (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of–

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection

such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

* * * * *

* * * * *

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a pditical subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that–

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communications, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communications or evidence derived therefrom as the judge determines to be in the interests of justice.

Section 823 New York State Code of Criminal Procedure

Eavesdropping warrants; notice and return

* * * * *

* * * * *

(1) Not later than sixty days after termination of the eavesdropping warrant or any renewals thereof, except as otherwise provided in subdivision two of this section, written notice of issuance of the eavesdropping warrant and of the period of authorized eavesdropping must be personally served upon the person named in the warrant whose conversations were sought to be overheard, or upon the owner, lessee, or occupant, if known, of the place or premises in which the eavesdropping device was installed, or upon the subscriber to the telephone or owner, or lessee, or occupant, if known, of the place or premises in which the eavesdropping device was installed, or upon the subscriber to the telephone or owner or lessee of the telegraph line described in the warrant.

Section 822 New York State Code of Criminal Procedure

Eavesdropping warrants; progress reports and notice

* * * * *

* * * * *

(3) Within a reasonable time, but in no case later than ninety days after termination of an eavesdropping warrant, or expiration of an extension order, except as otherwise provided in subdivision four of this section, written notice of the fact and date of the issuance of the eavesdropping warrant, and of the period of authorized eavesdropping, and of the fact that during such period communications were or were not intercepted, must be personally served upon the person named in the warrant and such other parties to the intercepted communications as the justice may determine in

his discretion is in the interest of justice. The justice, upon the filing of a motion by any person served with such notice, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and warrants as the justice determines to be in the interest of justice.

Effective June 25, 1969.

## CONSTITUTIONAL PROVISIONS

### AMENDMENT IV

Searches and seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

### AMENDMENT V

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in

jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## AMENDMENT XIV

§1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT

During the months of June and July, 1969 the petitioners' telephone was tapped by the New York State Police purportedly by virtue of an eavesdropping warrant dated June 2, 1969 issued by the Honorable Clare J. Hoyt, Justice of the Supreme Court, Ninth Judicial District, State of New York.

Subsequently and on the 5th day of July, 1969 a search warrant with supporting affidavits was signed by Justice Hoyt authorizing the search of the petitioners' apartment in the Village of Spring Valley, County of Rockland, State of New York. On the 10th day of July, 1969 said search warrant was executed by the New York State Police and on

the 12th day of August, 1969 the petitioners were indicted in the Rockland County Court under indictment #69-71 and #69-72 for Criminal Possession of a Dangerous Drug in the Third Degree and Criminal Possession of a Dangerous Drug in the Fourth Degree.

The petitioner, Hueston, was severally indicted for illegal possession of a quantity of slugs.

At the time that the eavesdropping warrant was issued, Section 823 of the Code of Criminal Procedure of the State of New York mandated that written notice of the issuance of the warrant and of the period of authorized interception be given to the persons named in the warrant within sixty (60) days after the termination of the original eavesdropping warrant or any renewals thereof. Section 823 of the Code of Criminal Procedure was replaced effective June 25, 1969 with a statute requiring notification within ninety (90) days of the expiration of the warrant. Thus, the ninety (90) day requirement took effect in the midst of the eavesdropping which was extended to July 10, 1969.

The petitioners moved in the Rockland County Court by Notice of Motion dated September 26, 1969 for copies of a wire tap order, affidavits in support thereof and for the return on the wire tap order. (Appendix F). This motion was opposed by the District Attorney by affidavit dated October 29, 1969 (Appendix G), and denied by decision dated January 15, 1970 (Appendix H).

Petitioners again moved for discovery and inspection of the eavesdropping warrant and affidavits in support thereof by Notice of Motion dated January 28, 1970. By order dated April 3, 1970, the District Attorney of Rockland County was ordered to furnish petitioners with copies of the applications submitted in support of the

eavesdropping warrant together with copies of the warrants. The petitioners finally received full copies of the affidavits in support of the eavesdropping warrant during the middle of May, 1970. These were received from the law secretary of the issuing judge inasmuch as the District Attorney of Rockland County was unable or unwilling to furnish them with all of the affidavits.

The instant eavesdropping warrant contained a provision expressly waiving notice to the petitioners. (Appendix I). In fact, the notice and return mandated by Section 822 of the Code of Criminal Procedure, which replaced Section 823-1 of the Code of Criminal Procedure, and Section 2518(8)(d) of Title III was never served upon either petitioner.

An eavesdropping warrant was issued on May 14, 1969, authorizing the wiretapping of a telephone listed to one Marge Youmans who resided in Rockland County, New York. An examination of that eavesdropping warrant (Appendix J) reveals that the notice mandated by both State and Federal law was expressly waived. In fact, Marge Youmans was never served with the notice or return.

A careful examination of the affidavits in support of the instant eavesdropping warrant reveals that the probable cause for its issuance was the interception of conversations between the petitioner Hueston and one Charlie Phillips over the Youmans telephone. Accordingly, this eavesdropping warrant was the fruits of the Youmans eavesdropping warrant.

Petitioners made a motion in the Rockland County Court prior to trial to suppress the eavesdropping warrant and to otherwise declare said eavesdropping warrant void. One of the issues raised in petitioners motion specifically dealt with that portion of the eavesdropping warrant which expressly waived notice to the petitioners. By decision

dated December 3, 1970, petitioners' motion was denied in its entirety. (Appendix E).

An evidentiary hearing dealing with the contents of the monitored conversations was held during the month of December, 1970 on petitioners motion.

Thereafter, petitioners were tried in March, 1971 and were convicted after trial for possession of dangerous drugs as a felony, possession of dangerous drugs as a misdemeanor and petitioner Hueston for possession of slugs as a misdemeanor.

On April 21, 1971 the petitioner, Hueston, was sentenced to an indeterminate sentence not to exceed four (4) years on a felony count, to one (1) year in the Rockland County jail on a misdemeanor count and to three (3) months in the Rockland County jail on a second misdemeanor count, said sentences to run concurrently.

On the same date the petitioner, Bonnie Kerr, was sentenced to one (1) year in the Rockland County jail on a felony count and up to six (6) months in the Rockland County jail on a misdemeanor count, said sentences to run concurrently.

A Certificate of Reasonable Doubt was issued by a Supreme Court Justice of the State of New York pending appeal to the Appellate Division, Second Judicial Department, State of New York. Petitioner, Hueston, was released on Fifteen Thousand and 00/100 ($15,000) Dollars secured bond and petitioner, Kerr, was released on Two Thousand Five Hundred and 00/100 ($2,500) Dollars secured bond.

The petitioner, Anthony Hueston, was also indicted in the Federal District Court for the Middle District of Pennsylvania for the unlawful manufacture of drugs. All of the evidence relating to the Federal indictment was

obtained by virtue of the eavesdropping warrant which was issued in New York State. Accordingly, the petitioner, Anthony Hueston, moved in the Federal District Court for the Middle District of Pennsylvania for an order suppressing evidence in the Federal prosecution and again raised the issue of the waiver of notice. This motion was granted by Decision and Order dated May 27, 1971. (Appendix D).

The Government appealed this Decision and Order to the Third Circuit Court of Appeals. The Third Circuit Court of Appeals unanimously affirmed the District Court on August 8, 1972, (Appendix C) a unanimous Court stating that the waiver of notice "resulted from a judicial act which on its face deliberately flouted and denigrated the provisions of Title III designated for the protection of the public."

In February, 1973 the Federal indictment was dismissed. The petitioners then perfected their appeal in the Appellate Division, Second Judicial Department. The Appellate Division reversed Rockland County Court in a three (3) to two (2) decision on August 13, 1973. (Appendix B).

The Decision by the Appellate Division was appealed by the People of the State of New York to the Court of Appeals of the State of New York. On May 2, 1974 the Court of Appeals of the State of New York in an unanimous decision reversed the Appellate Division and affirmed the Rockland County Court Order of December 3, 1970. (Appendix A). The reasoning of the Court of Appeals of the State of New York was that the petitioners had actual notice of the existence of the eavesdropping warrant inasmuch as that on September 26, 1969, within the ninety (90) day period mandated by Section 822-3, New York State Code of Criminal Procedure, they made a motion for the production of a wire tap order and accordingly, were not

prejudiced. The case was remanded to the Appellate Division by the Court of Appeals and on October 9, 1974 the Appellate Division affirmed the order of the Rockland County Court. (Appendix K).

The petitioners then moved one of the Justices of the Court of Appeals for leave and permission to appeal the Appellate Division's Decision and Order dated October 9, 1974 to the Court of Appeals of the State of New York. This motion was denied and a Certificate denying leave was issued on October 30, 1974. (Appendix L). On November 20, 1974 the Supreme Court of the United States denied petitioners' application for a stay pursuant to 28 U.S.C. 2101(f) and the petitioners were then imprisoned.

## REASONS FOR GRANTING THE WRIT

This case involves the construction of both Federal and New York statutes. Moreover, the interpretation by the Third Circuit Court of Appeals of the authorization statutes is in direct conflict with the interpretation of the highest court of the State of New York. In these circumstances action by this Court is required to resolve the conflict and to afford authoritative guidance in pending cases.

It is respectfully submitted that the New York State Court of Appeals has decided a federal question of substance not heretofore decided by the Supreme Court and in conflict with a Court of Appeals decision dealing with the same matter (*U.S. v. Eastman*, 465 Fed.2d 1057) (Appendix C) and not in accord with applicable decisions of the Supreme Court.

1. The legislative history of Title III reveals that Congress intended that Title III meet the standards

enunciated in *Berger v. New York*, 388 U.S. 41, which declared unconstitutional a prior New York State Wire Tap Statute. One of the objections to the then New York Statute was that there was no provision for notice and for a return on the warrant, leaving this to the discretion of the officer conducting the wiretap.

After *Berger*, exhaustive legislative hearings resulted in the passage of Title III and the total revision of the New York State Code of Criminal Procedure, regarding wiretapping, in order that it conform to the Federal Standards.

The legislative history of Title III was exhaustively discussed in *Gelbard v. United States*, 408 U.S. 41, and *United States v. Giordano*, 416 U.S. 505. As stated in *Gelbard, supra*, p. 46,

> "Except as expressly authorized in Title III . . . all interceptions of wire and oral communications are flatly prohibited"

and at p. 48,

> ". . . although Title III authorizes invasions of individual privacy under certain circumstances, the protection of privacy was an overriding congressional concern . . ."

and that, p. 51,

> "§2515 serves not only to protect the privacy of communications, but also to ensure that the courts do not become partners to illegal conduct . . ."

The pattern herein was to circumvent the clear intent of the Federal and New York Statutes. No notice or return according to statute was given after the Youmans warrant nor was any ever intended. No notice or return according to statute was given after the Kerr warrant nor was any ever

intended. The warrant submitted to the Court for signature in fact secured the Court as a partner in order to circumvent the law. It is unknown how many similar illegal warrants were signed prior to the Youmans warrant. The prejudice, if any needs be shown, is in the entire course of conduct herein. Not only were the petitioners prejudiced but every inhabitant of the State of New York was thereby prejudiced.

The Solicitor General of the United States in his petition for a Writ of Certiorari in *United States v. Giordano, supra,* referring to authorizations of wire taps by the Attorney General, stated:

> "Such authorization by a prosecutorial officer is not intended as a safeguard for the individuals privacy. That function rests with the issuing judge."

This Court held otherwise. Prosecutorial officers must adhere to the statute to safeguard individuals privacy as must the courts. The joining of the Court with the prosecutor to circumvent the statute should not be permitted else other overzealous officials be encouraged not only to continue this type of circumvention but find other and different ways to circumvent the statutes.

2. The suppression of the warrant in the instant case is mandated by 18 U.S.C. Sections 2515 and 2518 inasmuch as it was obtained in violation of Title III. In *Giordano,* the Court stated in clear terms that the [suppression] "issue does not turn on the judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights, but upon the provisions of Title III." See *United States v. Eastman, supra,* and *United States v. Wolk,* 466 Fed.2d 1143 (Eighth Circuit).

In *United States v. Cafero,* 473 Fed.2d 489 (1973) (Third Circuit), a unanimous Court spoke as follows regarding the

instant eavesdropping warrant.

". . . We believe this distinction is relevant here for it points out that in *Eastman* the failure to comply with the provisions of Title III was begun in the authorization stages of that surveillance and persisted throughout the entire procedure. The authorizing judge in *Eastman* expressly "waived" the post search notice provisions of Title III at the time he authorized the interception . . ." p. 499

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". . . Furthermore, any Fourth Amendment overtones of *Eastman* result not from post-search ministerial delay or error, but from a deliberate attempt initiated prior to the search to avoid procedures mandated following the search . . ." p. 499-500.

It is finally submitted that the instant warrant must be struck down to preserve judicial integrity. *Linkletter v. Walker*, 381 U.S. 618 and *Elkins v. United States*, 364 U.S. 206.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a Writ of Certiorari should be granted.

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L. Rissier Bernard
for petitioner, Bonnie Kerr

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Petitioners.

# Appendix

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## APPENDIX A
## OPINION OF THE NEW YORK STATE COURT OF APPEALS

RABIN, J.:

The question presented in this appeal is whether evidence obtained as a result of telephone conversations intercepted pursuant to a warrant should be suppressed. The Appellate Division, apparently holding that the eavesdropping warrant was void on its face, ordered that all evidence obtained as a result of the conversations be suppressed. We reverse.

The defendant Bonnie Kerr (Kerr) was convicted of Criminal Possession of a Dangerous Drug in the Third Degree and in the Fourth Degree. The defendant Anthony Hueston (Hueston) was convicted of the same crimes, and also of Unlawfully Using Slugs in the Second Degree. These convictions were obtained after trial in which drugs and slugs seized pursuant to a search warrant were introduced in evidence. The search warrant was based on a supporting affidavit which referred to information obtained as a result of the prior wiretap of defendant Kerr's telephone pursuant to warrant. The defendants made motions to suppress the evidence obtained as a result of the eavesdropping warrant and as a result of the search warrant. The County Court denied both motions, and the Appellate Division held that the conversations were illegally intercepted and that evidence obtained as a result, including the evidence seized pursuant to the search warrant, must be suppressed.

The eavesdropping warrant on Kerr's telephone was also the subject of judicial decision in *United States v. Eastman* (465 F. 2d 1057 [3rd Cir. 1972]).

Hueston was indicted with Gordon Eastman in the United States District Court, Middle District of Pennsylvania, for the manufacture of drugs in violation of Federal statutes. The evidence obtained in the Federal prosecution was derived in part from the conversations intercepted by New York police pursuant to the warrant in question here. In *Eastman*, the United States Court of Appeals affirmed the decision of the District Court suppressing the evidence obtained as a result of the intercepted conversations. Though discussing several grounds for suppression, the *Eastman* court stated that "the touchstone" of its decision was that the case was "not one in which an inventory was delayed but rather [was] one in which specific provisions of Title III were deliberately and advertently not followed. In other words, the failure to file the notice of inventory [was] no mere ministerial act. It resulted from a judicial act which on its face deliberately flouted and denigrated the provisions of Title III designated for the protection of the public." (465 F. 2d at 1062.)

The Appellate Division adopted this reasoning in reversing and suppressing the evidence: "For the reasons stated by the United States Court of Appeals [in *Eastman*], we think that the County Court erred in its denial of defendants' motion to suppress the communications intercepted pursuant to the eavesdropping warrant [citation omitted]." (*People v. Hueston & Kerr*, 42 A D 2d 860, 861 [2d Dept., 1973].) The People appeal the order pursuant to permission granted by Justice Latham of the Appellate Division. With due respect for the authority of the *Eastman* case, we are not convinced that its reasoning should be followed.

Two principal objections to the use of the intercepted conversations are presented for our consideration: (1) that

the eavesdropping warrant is void on its face; and (2) that the failure of the prosecution to give notice of the warrant, as required by the former Code of Criminal Procedure, section 823, and title 18 of United States Code, section 2518(8)(d), renders any evidence obtained from the eavesdropping inadmissible.

The defendants' claim that the warrant is void on its face because its concluding sentence provided: "That notice to the said TONY DEJESTE and BONNIE KERR is hereby expressly waived." The warrant, signed by since deceased Justice Hoyt, was dated June 2, 1969. At that time section 823 of the Code of Criminal Procedure required that written notice of the issuance of the warrant and the period of authorized interception be given to the persons named in the warrant within sixty days after the termination of the original eavesdropping warrant or any renewals thereof.[1]

The People maintain, *inter alia*, that the waiver in the warrant was not intended to dispense with the post-termination notice required by section 823. Rather they contend that the "obvious purpose of the statement was to eliminate the giving of any *advance* notice of the warrant to the respondents at the time the warrant was executed." (Emphasis added.) The two dissenting Justices in the Appellate Division also interpreted the statements as dispensing with prior or contemporaneous notice, not with ultimate notice. While we find this interpretation strained, since the Code had no requirement of advance or prior notice with respect to eavesdropping warrants to be "ex-

1. Former section 823 of the Code of Criminal Procedure, effective June 5, 1968 provided in pertinent part as follows:

"§823. Eavesdropping warrants; notice and return. 1. Not later than sixty days after termination of the eavesdropping warrant or any renewals thereof . . . . written notice of issuance of the eavesdropping warrant and of the period of authorized eavesdropping must be personally served upon the person named in the warrant whose conversations were sought to be overheard . . . or upon the subscriber of the telephone. . . ." (L. 1968, ch. 546, p. 1953.)

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pressly waived", we find it unnecessary to resolve this ambiguity. Even assuming that the warrant language purported to waive the post-termination notice, we find that the statement was a nullity and that the warrant was valid.

Briefly, the statute entitles the defendants and any other civilian, to post-termination notice of the eavesdropping. This guarantee of notice remains effective regardless of any statement in a warrant to the contrary; and any prosecution attempt to rely upon the language in the warrant as granting a dispensation from the statutory notice requirement would be futile. Equally futile is a defendant's attempt to rely upon a statement of waiver in the warrant, if the prosecution in fact gave the required notice. In short, the guarantee we are concerned with here applies to the notice itself, not to the wording of the warrant; and consequently, to suppress the evidence, a defendant must show a failure of notice (see *People v. Tartt*, 71 Misc 2d 955, 959, 961 [Sup. Ct. Erie Co. 1972]). This brings us to the more serious irregularity here, the prosecution's failure to give notice.

The People admit that they did not give the written post-termination notice required by the statute. While we may assume that the lack of such notice might ordinarily require suppression of the evidence obtained as a result of the warrant (see *People v. Tartt*, 71 Misc. 2d 955, *supra*), we believe that the special circumstances present in this case compel a different conclusion.

In papers dated September 26, 1969, the defendants moved for an order directing the District Attorney "to furnish defendants a copy of the Affirmations and/or Affidavits used in support of obtaining a Wire Tap Order, the Wire Tap Order itself and the return on the Wire Tap Order . . . ." The defendants therefore had actual notice

of the existence of the warrant at least by September 26, 78 days following July 10, the termination date of the warrant as extended. While the statute requiring notice to be given within 60 days of the expiration of the warrant was in effect when the warrant was issued on June 2, 1969, this statute was replaced effective June 25, 1969 with a statute requiring notification within 90 days of the expiration of the warrant. Thus, the 90 day requirement took effect in the midst of the eavesdropping which was authorized through July 10, 1969 by the warrant as extended.

The change from 60 to 90 days was part of the addition of Title III to the Code of Criminal Procedure, which revamped the New York eavesdropping scheme following the enactment by Congress of the Omnibus Crime Control and Safe Streets Act of 1968 (U.S. Code, tit. 18, §§2510-2520). (See CPL Article 700, Practice Commentary [McKinney's 1971]. Title III of the Code provided that whether the admissibility of evidence obtained through eavesdropping would be governed by the old or the new law would turn on whether the act of eavesdropping occurred prior to the effective date of the act. (L. 1969, ch. 1147, §9.)[2] Consequently, despite the date of issuance, some of the acts of eavesdropping involved here occurred after the effective date of the new statute and the admissibility of evidence obtained through the interceptions authorized by the warrant in question is not governed completely by the

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2. Title III of the Code of Criminal Procedure provided with regard to the effective date of its provisions:
"In any civil or criminal action . . . occurring after the effective date of this act, the admissibility of any evidence obtained by any act of eavesdropping prior to the effective date of this act, or any evidence obtained through or resulting from information obtained by such act of eavesdropping, shall be determined according to the provision of law in force and effect immediately prior to the effective date of this act in the same manner as if this act had not been enacted." (L. 1969, ch. 1147, §9.)

60 day requirement.[3]

Furthermore, it appears that the purposes served by the notification requirement are, first, to publicize wiretaps to assure the community that eavesdropping techniques are reasonably employed and that at least the subject will eventually learn of them (cf. S. Rep. No. 1097, 90th Cong., 2d Sess., U.S. Code Cong. & Admin. News, at p. 2194 [1968] [regarding purpose of notice in Federal statute]); and, second, to allow defendants in criminal actions to test the legality of the warrants by making timely motions to suppress evidence. The motion dated September 26, 1973, evidencing the defendant's knowledge of the wiretap indicates that both of the purposes behind the notification requirement were accomplished as to these defendants.

Under these circumstances, we do not believe any useful purpose would be served by a holding which hinged the admissiblity of evidence upon a prosecutor's handing a formal written notification to a defense attorney who was already in possession of the information contained therein. Where actual knowledge of the existence of the warrant is demonstrated within the time period allowed for notification by the prosecution, such formal written notification becomes a ministerial act, and the failure to so notify does not require suppression of evidence.

Besides citing section 823 of the Code of Criminal Procedure, the defendants also rely on the similar provision

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3. We also note that the affidavit of a State Policeman in support of the search warrant indicates that the police did not rely solely on conversations intercepted prior to June 25, 1969. Information obtained from physical surveillance, from the Federal Bureau of Investigation, and from conversations intercepted after June 25, 1969 are also referred to. A conversation intercepted July 4, 1969 between Hueston (Tony DeJeste) and Gordon Eastman concerned the receipt of 30 ounces of "speed" from Eastman sometime after July 7, 1969.

of a Federal statute (18 U.S.C. §2518[8][d]).[4] Section 2518 provides that notification of certain facts concerning the application for an eavesdropping warrant must be given within 90 days of the expiration of the warrant as extended. We find there is no basis for distinguishing between the requirements of the Federal and State statutes on the facts presented, and the motion to suppress on the Federal grounds also fails for the reasons outlined above. (Cf. *United States v. Cafero*, 473 F. 2d 489, 499 [3rd Cir. 1973], U.S. app. pndg.; *United States v. La Gorga*, 336 F. Supp. 190, 194 [W.D. Pa. 1971].)

Finally, we have examined the application presented in support of the warrant and find that, contrary to defendants' contentions, it was in sufficient compliance with section 817-2 of the Code of Criminal Procedure (L. 1968, ch. 546, p. 1951) and section 2518 of title 18, United States Code. The order appealed from should be reversed, the defendants' motions to suppress should be denied, and the matter remitted to the Appellate Division for further proceedings in accordance with this opinion (i.e., for consideration of questions of fact, if any, raised on the appeal to that court [see §§ CPL 470.25(2)(d), 470.40 (2)(b)]).

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Order reversed and the case remitted to the Appellate Division for further proceedings in accordance with the opinion herein. Opinion by Rabin, J. All concur.

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4. Section 2515 of 18 U.S.C. provides that, "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial . . . before any court . . . of . . . a State, or any political subdivision thereof if the disclosure of that information would be in violation of this chapter." The statute has been held exclusionary in *Gelbard v. United States* (408 U.S. 41).

## APPENDIX B
## OPINION OF THE SUPREME COURT
## APPELLATE DIVISION, SECOND DEPARTMENT

Before HOPKINS, Acting P.J., GULOTTA, BRENNAN, LATHAM and BENJAMIN, JJ.

MEMORANDUM BY THE COURT.

Defendants appeal from two orders of the County Court, Rockland County, one dated December 3, 1970, and the other dated March 1, 1971, both of which denied their applications to suppress certain evidence, and from a judgment of that court rendered April 20, 1971, which convicted them both of criminal possession of drugs in the third and fourth degrees and defendant Hueston, alone, of unlawfully using slugs in the second degree, after a jury trial, and imposed sentence.

Both orders and the judgment are reversed, on the law, the motions to suppress are granted and the case is remanded for a new trial to be conducted in accordance with this memorandum.

[1] Pursuant to the investigation of a suspected drug operation which was allegedly being carried on by the defendants and others, the New York State Police procured both an eavesdropping warrant and a search warrant. Prior to trial defendants moved to suppress the evidence gathered under both warrants. In assailing the eavesdropping warrant, which had been issued first, the defendants claimed, *inter alia*, that such warrant was illegally issued because by a provision included therein, on its face, no notice of the surveillance was to be given to the defendants subsequent to the expiration of the warrant as was required by section 823 of the Code of Criminal Procedure then in effect (L.1968, ch. 546). This claim was

rejected by the County Court and by its order of December 3, 1970 defendants' motion to suppress was denied. Subsequently defendant Hueston was involved in a federal prosecution which was predicated, in part, on the information garnered by the New York State Police pursuant to the said eavesdropping warrant. Upon Hueston's application to the Federal District Court, the evidence he sought unsuccessfully to suppress in the County Court was ruled to be inadmissible, that court holding that the warrant was issued in violation of both the pertinent New York and Federal statutes. Upon appeal to the U.S. Court of Appeals for the Third Circuit that decision was affirmed (United States v. Eastman, 465 F.2d 1057). For the reasons stated by the U.S. Court of Appeals therein, we think that the County Court erred in its denial of defendants' motion to suppress the communications intercepted pursuant to the eavesdropping warrant (see, also, People v. Tartt, 71 Misc.2d 955, 336 N.Y.S.2d 919).

[2] Upon reading the affidavits in support of the People's application for the search warrant it has become evident to us that the prime basis for the probable cause alleged therein was the information and communications intercepted by the New York State Police pursuant to the illegally issued eavesdropping warrant. This ground was argued to the County Court by the defendants in support of an application to suppress the evidence gathered pursuant to such search warrant and rejected by it. Such ruling resulted in the order of March 1, 1974 which denied that application. Accordingly, it is our opinion that as the eavesdropping warrant falls, so must the search warrant which was predicated upon information illegally perceived pursuant thereto.

Defendants also appeal from their judgment of conviction. As the evidence pursuant to the two warrants in

question has been ruled by us to have been inadmissible, and was, in fact, used against the defendants at their trial, they are entitled to a new trial at which the use of such evidence will be excluded.

HOPKINS, Acting P.J., and GULOTTA and BRENNAN, JJ., concur.

LATHAM and BENJAMIN, JJ., dissent and vote to affirm with the following memorandum:

The eavesdropping warrant is dated June 2, 1969 and names appellants herein. The warrant provides, *inter alia*, that notice to appellants "is hereby expressly waived".

Nowhere does the state statute in effect at that time (Code of Criminal Procedure, §814 et seq., L.1968, ch. 546) require that appellants be given notice of the warrant at or prior to the time the warrant is executed. Indeed, such a requirement would vitiate the utility of any eavesdropping warrant. The applicable federal statute similarly does not contain a requirement that appellants be given such notice (18 U.S.C. §2510 et seq.). Both statutes provide however that certain notice be given after the warrant is executed. Thus, Subidivision 1 of §823 of the Code provided:

> "Not later than sixty days after the termination of the eavesdropping warrant *** written notice of issuance of the eavesdropping warrant and of the period of authorized eavesdropping must be personally served upon the person named in the warrant whose conversations were sought to be overheard ***."

Similarly, 18 U.S.C. §2518(8)(d) provides, in part:

> "Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order

or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application *** an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted."

It is true that Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 requires that some form of notice is constitutionally required (388 U.S. at 60, 87 S.Ct. 1873), however, the notice required does not necessarily have to be given prior to or contemporaneous with the search and seizure (Katz v. United States, 389 U.S. 347, 355 n. 16, 88 S.Ct. 507, 19 L.Ed.2d 576). Thus, it cannot be said that the instant eavesdropping warrant is void on its face merely because it provides that prior or contemporaneous notice of its execution is waived (see "The Supreme Court, 1966 Term", 81 Harv.L.Rev. 69, 190 [1967]: "It is also possible that the Court's cricitism [with respect to lack of notice] would be satisfied by a requirement that notice be given after the eavesdrop").

The issue then becomes whether the warrant becomes void *ab initio* by reason of the failure of the court below to give the notices required by CCP 823 (subd. 1) and 18 U.S.C. §2518(8)(d). In our opinion, the warrant is not void *ab initio* for this reason.

The Senate's report states, with respect to 18 U.S.C. 2518(8)(d), "[T]he intent of the provision is that the principle of post use notice will be retained *** Through its

operation all authorized interceptions must eventually become known at least to the subject" (S.Rep.No.1097, 90th Cong., 2d Sess. [1968], U.S.Code & Adm.News, at p. 2194 [1968]). The ABA Standards Relating to Electronic Surveillance states: "The principle *** should itself always remain the post-use notice would have to be given at some time" (ABA Standards Relating to Electronic Surveillance 161 [1971 Approved Draft]). Thus, in United States v. Wolk, 466 F.2d 1143 (8th Cir. 1972) it was held that "Inasmuch as the statute has been substantially complied with in that the appellees *** have not been prejudiced by the delay in formal notification, the evidence should not have been suppressed" (466 F.2d at 1146).

The court in *Wolk* distinguished United States v. Eastman, 465 F.2d 1057 (3rd Cir. 1972), noted, 10 Houston L. Rev. 499 (1973), which involved the very eavesdropping warrant with which we are presented at bar, on the ground that the judge who granted the wiretap authorization in *Eastman* " 'waived' the service of the inventories" (466 F.2d at 1145). In our opinion, the court in *Wolk* and the court in *Eastman* both misread the waiver provision. As noted earlier, the provision dispenses with prior or contemporaneous notice, not with ultimate notice. So viewed, appellants herein were not prejudiced by the noncompliance objected to because they had copies of the eavesdropping warrant, the affidavits in support of the warrant, and the logs and transcripts of the conversations overheard through their attorney in December, 1969. Under these circumstances, appellants were not prejudiced by delayed compliance with the applicable statutes (United States v. Wolk, *supra;* People v. DiLorenzo, 330 N.Y.S.2d 720, 69 Misc.2d 645). Appellants' attorney did in fact move against the warrant and received a decision thereon on the merits.

Nor is it entirely clear that an inventory is constitutionally required (note, Wiretapping and Electronic Surveillance—Title III of the Crime Control Act of 1968, 23 Rutgers L.Rev. 319, 369 [1969]). The ABA Standards (*supra*, 160) states: "A failure to make a correct return or to file the inventory *** should result in the suppression of evidence only where prejudice is shown". Once it is found that the warrant is valid, a subsequent defect in procedure does not always make the warrant void *ab initio* (United States v. Iannelli, 339 F.Supp. 171, 175 [W.D.Pa. 1972]).

Accordingly, we dissent and vote to affirm the judgment.

# APPENDIX C
# OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

(Filed August 8, 1972)

BIGGS, *Circuit Judge.*

This case presents unusual circumstances as will appear hereinafter. It arises under Criminal Procedure, Eavesdropping Warrants, Chapter 546, §814, et seq., McKinney's 1968 Session Laws of New York, 191st Session, and the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§2510-20.

The appeals at bar arise from the same criminal proceedings in the Middle District of Pennsylvania. Hueston and Eastman were indicted for unlawful manufacture of drugs in violation of 21 U.S.C. §331(q)(1)[1] and 18 U.S.C. §2. Prior to trial, Hueston, but not Eastman,[2] filed a motion to suppress the contents of intercepted telephone communications and all evidence derived therefrom. Hueston's motion was heard on May 19, 1971 and the District Judge granted it.[3] The United States

1. In 1970, Public Law 91-513 recodified subsection (q) of 21 U.S.C. §331, and the manufacture, sale, disposition, possession and other traffic in stimulant and depressant drugs are regulated now under 21 U.S.C. §801, *et seq.*

2. Hueston is represented by other counsel than Eastman's and this counsel has filed a brief in this court but since Eastman filed no motion to suppress we doubt the standing of his counsel to file a brief here. The notice of appeal by the United States states that the District Judge sustained "defendants' " motion to suppress (*i.e.*, the word "defendants' " is plural, with a caret directly under the apostrophe, written apparently in ink). Even if this notice of appeal purports to relate to both defendants, it will not suffice to give standing to Eastman. We will, however, treat Eastman's brief as if it had been filed in this court *amicus curiae.*

3. Judge Muir's order of May 27, 1971 was as follows: "In accordance with the Opinion filed this day, it is ordered that the motion made by the defendant Hueston to suppress is hereby granted and it is further ordered that the contents of any intercepted wire or oral communication, or evidence derived therefrom, obtained pursuant to the Order of the Supreme Court, 9th Judicial District, State

has appealed, the District Judge having granted the certificate required by 18 U.S.C. §3731 and §2518(10)(b). The wiretaps have been certified to this court *in camera* and an examination indicates that they are incriminating.

The language of the wiretap warrant with particular regard to the period during which the warrant was to be effective was: Law officers "[a]re further commanded that

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of New York, dated June 2, 1969, and any extension of that Order, shall be treated as having been obtained in violation of Chapter 119, Title 18, United States Code, 18 U.S.C. §2510 et seq."

Judge Muir's opinion, 326 F. Supp. 1038, 1039 (M.D. Pa. 1971), stated in part:

"On June 2, 1969, upon application of the District Attorney of Rockland County, New York, a judge of that county [Justice Clare J. Hoyt] issued an order authorizing the interception of the defendant's [Hueston's] telephone communications over a given telephone number. The judge concluded his order with the statement . . . notice to the said Tony DeJest . . . is hereby expressly waived.' The telephone line was tapped during June and July, 1969, pursuant thereto.

"The United States Attorney has given notice to the defendant that he intends to use evidence derived from the wiretap in the defendant's forthcoming trial.

"It is admitted that the issuing judge never caused to be served on the defendant the inventory, including notice, as required by 18 U.S.C. §2518(8)(d) and [that] he never postponed the service thereof as he might have done under that section. The order indicates that the issuing judge intentionally eliminated the service of the inventory and notice.[*]

"The government takes the position that the failure to serve the inventory and notice is not fatal. My view is otherwise.

* * * * *

"The provision for service of the inventory and notice is an absolutely necessary link in the chain of protective measures built into the statute. 'Standards Relating to Electronic Surveillance,' American Bar Association Project on Minimum Standards for Criminal Justice, Tentative Draft of June, 1968, Comment at page 162, final draft adopted A.B.A. House of Delegates, February 8, 1971.

"In Berger v. New York, 388 U.S. 41 (1967), the Supreme Court struck down a New York wiretapping statute because it did not contain, inter alia, a requirement of notice to the person whose wire had been tapped. In passing, I note that the New York statute in effect at the time of the wiretap in this case, obviously enacted in response to *Berger*, requires notice to the defendant within ninety [*sic*] days of the termination of the tap, unless a postponement for a reasonable period of time is ordered. New York Code of Criminal Procedure, §823, effective June 5, 1968.

"In my view, the failure to serve the requisite inventory and notice vitiates the wiretap and precludes the use of evidence derived therefrom."

*Examination of the record demonstrates the correctness of these statements.

such eavesdropping shall take effect on June 2, 1969, *or as soon thereafter as is reasonably practicable* and that such eavesdropping shall not cease after any one or more of the above described conversations shall have been overheard, but shall cease at the close of the twentieth calendar date after the above mentioned, To Wit: One June 22, 1969, *or on the day thereafter which is twenty (20) calendar days after the date of actual installation, whichever last occurs* and that such eavesdropping may be conducted at all hours of the day and night. . . ." (Emphasis added). The date of the warrant was June 2, 1969. Not all the wiretaps which have been received and examined *in camera* are within the permissible period, but in view of our decision it is not necessary to discuss this point.[4] The statute under which Justice Hoyt issued the wiretap warrant on June 2, 1969 was §819.2, c. 546, McKinney's 1968 Session Laws of New York (repealed June 25, 1969), which provided that an eavesdropping warrant must contain: "The date of issuance, date of effect, if known, and termination date" and stated that "[t]he effective period of the warrant must not exceed twenty days. . . ."[5] Section 823.1 of the statute provided for "written notice and return" to be served on the person whose line had been tapped "[n]ot later than sixty days after termination of the eavesdropping warrant. . . ." The first tap was installed on June 3, 1969.

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4. We point out nonetheless that in *United States v. Sterling*, 369 F.2d 799, 802 (3 Cir. 1966), we stated: "Nevertheless, the law is quite clear that the inclusion of illegally obtained evidence does not vitiate a search warrant which is otherwise validly issued upon probable cause reflected in the affidavit and based upon proper sources." But cf. *United States v. Scott*, 331 F. Supp. 233, 247-49 (D.D.C. 1971), where the indiscriminate 100% taking in of all calls did not sufficiently limit the wiretaps as required by the District of Columbia statute and hence all were suppressed.

5. It should be noted that the New York statutes cited above were supplanted by L.1970, c. 996, §1; N.Y. CPL §§700.10-700.70 (McKinney 1971). Section 700.10(2) provides that no eavesdropping warrant can be effective ". . . in any event longer than thirty days." Accord, 18 U.S.C. §2518(5).

It follows, therefore, that the authorized period of the wiretaps ran out on June 23, 1969. There is no statement in the statute as to who shall give the required written notice to the individual whose line has been tapped. There is nothing in the record which indicates that any notice at any time was given to Hueston respecting the wiretaps. The last line of Justice Hoyt's order constituting the eavesdropping warrant states: ". . . *notice* to the said Tony DeJest and the said Bonnie Kerr *is hereby expressly waived.*" (Emphasis added). Compare the language of Judge Muir's opinion hereinbefore set out at note 3, *supra.*

The federal statute which provides for the actual issuance of wiretaps, 18 U.S.C. §2518(4),[6] is set out in the margin and the record shows that all of its provisions, *viz.*, (4)(a) to (4)(e), inclusive, were conformed to by Justice Hoyt when he issued his warrant. In short, the specifications of the federal statute have been followed insofar as subsection (4) is concerned.

We note that at page 160 of the American Bar association Project on Minimum Standards for Criminal Justice, Standards Relating to Electronic Surveillance, "*Approved Draft 1971,*" it is stated: "A failure to make a correct return or to file the inventory, noted below,

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6. 18 U.S.C. §2518(4) is as follows: "Each order authorizing or approving the interception of any wire or oral communication shall specify—

"(a) the identity of the person, if known, whose communications are to be intercepted;

"(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

"(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

"(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained."

however, should result in the suppression of evidence only where prejudice is shown. See *Evans v. United States*, 242 F.2d 534 (6 Cir.), *cert. denied*, 353 U.S. 976 (1957); *United States v. Gross*, 137 F. Supp. 244, 248 (S.D.N.Y. 1956) (return ordered in lieu of suppression)." The Government takes the position that the rule that prejudice must be shown by reason of the fact that Hueston did not receive the notice or inventory required by the New York and Federal statutes for §2518(8)(d) is an attempt to "reflect existing search warrant practice" under Rule 41(d), Fed. R. Crim. Proc., 18 U.S.C. See S. Rept. 1097, 90th Cong. 2d Sess. 105 (1968). The Government's contention is based on the fact that the record shows that Hueston was aware of the wiretaps at least by September 26, 1969 because he filed a motion in the New York State Court requesting an order of discovery and an inspection of the wiretap order and its supporting affidavit.[7] The Government cites *United States v. Haskins*, 345 F.2d 111, 117 (6 Cir. 1965); *Gilbert v. United States*, 291 F.2d 586, 588 (9 Cir. 1961); *Evans v. United States, supra* at 536. In *United States v. Averell*, 296 F. Supp. 1004 (E.D. N.Y., 1969), a delay in filing the warrant return and inventory of seized items for a period of

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7. The Government's brief states at 6: "On September 26, 1969, defendant Hueston [by his then counsel Auerbach] filed a motion in state court requesting an order of discovery and inspection of this wiretap order and its supporting affidavit. Obviously, such a motion could be filed only if the defendants had notice that a wiretap had been used, and simple arithmetic reveals that the motion was filed within ninety days of July 1969. The record does not disclose whether this information was gained from notice by New York State officials or from the defendants own independent sources of information. At that point, however, the issuance of a formal notice and inventory under section 2518(8)(d) would not have given the defendants any significant information about the wiretap that they did not already possess. Under these circumstances, it is our position that there is no reason to suppress the evidence because of the failure to follow the formal notice procedure set forth in section 2518(8)(d)."

In support of its position the Government cites the existing sea[illegible]rrant practice, contending that notice requirements are intended primarily to [illegible]he defense an adequate remedy to move to suppress seized items prior to [illegible]d-mission into evidence and contending that prejudice must be shown.

two and one-half years was held not to vitiate the warrant so long as the proper notice is given prior to admission of the items in evidence.[8] The Government goes on to assert that the failure to make a correct return or to file proper notice is a "ministerial act" and should result in suppression only where prejudice is shown, citing *McGurie v. United States*, 273 U.S. 95 (1927); *United States v. Haskins, supra, Evans v. United States, supra, Giacolone v. United States*, 13 F.2d 108 (9 Cir. 1926); *Rose v. United States*, 274 F. 245 (6 Cir.), *cert. denied* 257 U.S. 655 (1921); *United States v. Callahan*, 17 F.2d 937 (M.D.Pa. 1927).

We cannot agree with the Government's position for two reasons:

(1) 18 U.S.C. §2518(10)(a) states *inter alia*, "Any aggrieved person in any trial . . . may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—(i) *the communication was unlawfully intercepted;* (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or (iii) the interception was not made in conformity with the order of authorization or approval." (Emphasis added). As is pointed out in the admirable opinion of Judge Beck in *United States v.*

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8. The Government states the following in its brief at 8, note 7:
"Significantly, §2518(9) makes additional provision for notice 10 days prior to trial. The Senate Report notes that, 'The 10 day period is designed to give the party an opportunity to make a pretrial motion to suppress. . . .' (1968 U.S. Code Cong. and Adm. News, p. 2196). There can be no doubt that there was complete compliance with this provision since the defendants made timely motions to suppress prior to trial in the state court."

We note that 18 U.S.C. §2518(9) requires a showing of prejudice and that 18 U.S.C. §2518(8)(d) does not.

For reasons that will appear at later points in this opinion we are unable to see how the statement quoted from the Government's brief is of aid to the Government's position in the circumstances at bar.

*Narducci*[9] in a closely analogous situation, an exclusionary rule has been written into the Act by §2515, which states, *inter alia:* "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial . . . before any court . . . *if the disclosure of that information would be* in violation of this chapter." (Emphasis added). That §2515 is exclusionary is now settled beyond all doubt by *Gelbard v. United States,* No. 71-110 and *United States v. Egan,* No. 71-263, — U.S. — (filed June 26, 1972).

In the case at bar we have the extraordinary circumstance of an advertence to the provisions respecting "written notice" as required by the New York Statute, §823.1 of McKinney's 1968 Session Laws of New York, and the inventory required by 18 U.S.C. §2518(8)(d) and an express failure by the New York Justice to adhere to these provisions. We point out that the inventory requires the equivalent of notice of the New York Statute for the statute provides for "an inventory which shall include notice of—(1) the fact of the entry of the order or the application; (2) the date of the entry of the order or the application; (2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and (3) the fact that during the period wire or oral communications were or were not intercepted." The inventory must be filed within ninety days after the filing of the application for a wiretap order under §2518(7)(b) or within sixty days after the termination of the eavesdropping warrant as provided by the New York statute.

The legislative history, 1968 U.S. Code Cong., and Adm.

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9. —F.Supp.—(E.D. Pa. 1972), Crim. No. 71-312, 3/23/72, Part "IV." In *Narducci* the wiretap was not properly authorized because the Attorney General had not followed 18 U.S.C. §2516(1), Title III of the Federal Act.

News, at 2184-85, states: "Section 2515 of the new chapter imposes an *evidentiary sanction to compel compliance with the other prohibitions of the chapter. . . . The provision must, of course, be read in light of §2518 (10)(a) discussed below, which defines the class entitled to make a motion to suppress.* . . . The provision thus forms an integral part of the system of limitations designed to protect privacy. Along with the criminal and civil remedies, it should serve to guarantee that the standards of the new chapter will sharply curtail the unlawful interception of wire and oral communications." (Emphasis added). Thus the Congressional intent to insure compliance with the dicates of the law authorizing wiretaps by means of the exclusionary rule of §2515 is clearly evident. The relationship between §2515 and §2518(10)(a) is thus demonstrated.

In order to determine if "the disclosure of that information [*i.e.*, the contents of the interception] would be in violation of this chapter," we look to §§2511, 2517, and 2518(8)(d). Section 2511 prohibits any willful use of an interception "except as otherwise specifically provided in this chapter." Section 2517(3), as Judge Becker points out, is an exception to §2511 and allows the disclosure of a wiretap at trial if "intercepted in accordance with the provisions of this chapter." Since the interception in this case was not in accordance with the provisions of this chapter, *i.e.*, §2518(i)(d), as discussed above, it follows that the disclosure of the contents of the wiretap was in violation of this chapter, *i.e.*, "a willful use of an interception under §2511 and the statutory rule would apply here." *Narducci, supra,* at—.

The inventory provisions of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §2518(8)(d), have been construed rather broadly in this Circuit. In *United States v. LaGorga,* 336 F.Supp. 190 (W.D. Pa. 1971), it was held

that absent a showing of prejudice filing a delayed inventory was permissible. In *LaGorga* there had been extensions allowed by court order extending the time for filing the inventory for a period of about six months. Judge Weis, referring to the case at bar, stated that it could be distinguished because in *Eastman* there had been "*complete and deliberate failure to file any inventory.*" (Emphasis added). The touchstone of our decision on this aspect of the case at bar is not one in which an inventory was delayed but rather is one in which specific provisions of Title III were deliberately and advertently not followed. In other words the failure to file the notice or inventory is no mere ministerial act. It resulted from a judicial act which on its face deliberately flouted and denigrated the provisions of Title III designated for the protection of the public. This we cannot countenance. The communications were unlawfully intercepted. Therefore, the provisions of §2518(10)(a)(i) apply and the motion to suppress must be granted.

(2) There is another reason, however, which perhaps may be even more cogent in the disposition of this case. The Federal statute and the New York statute here *sub judice* under which Justice Hoyt[10] issued the warrant, were we believe based in very large part upon the opinion of Mr. Justice Clark in *Berger v. New York*, 388 U.S. 41 (1967).[11] In *Berger*, Mr. Justice Clark laid great emphasis upon the constitutional safeguards required of an eavesdropping statute. In criticizing the New York statute, the predecessor to the New York statute presently before us,

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10. Justice Hoyt died on February 20, 1970. See the letter to the writer from Administrative Judge Frank S. McCullough, which we make a part of the record herein.

11. In addition to *Berger v. New York*, it is entirely clear that *Katz v. United States*, 389 U.S. 347 (1967) was in the mind of Congress when it framed the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§2510-20.

the Justice laid emphasis on the lack of notice required by the New York statute and made it clear that notice must be given to meet the constitutional standards of the Fourth Amendment. He stated, *id.*, at 60: "Finally, the statute's procedure, necessarily because its success depends on secrecy, has no requirement for notice as do conventional warrants, nor does it overcome this defect by requiring some showing of special facts. On the contrary, it permits unconsented entry without any showing of exigent circumstances. Such a showing of exigency, in order to avoid notice, would appear more important in eavesdropping, with its inherent dangers, than that required when conventional procedures of search and seizure are utilized. Nor does the statute provide for a return on the warrant thereby leaving full discretion in the officer as to the use of seized conversations of innocent as well as guilty parties. In short, the statute's blanket grant of permission to eavesdrop is without adequate judicial supervision or protective procedures."[12] [13]

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12. Section 814.4 of the New York Act seems based on Mr. Justice Clark's opinion. It defines "exigent circumstances": "Exigent circumstances" means conditions requiring the preservation of secrecy, and whereby there is a reasonable likelihood that a continuing investigation would be thwarted by alerting any of the persons subject to surveillance to the fact that such surveillance had occurred." §823.2 states: "On a showing of exigent circumstances to the issuing justice the serving of the notice required by this section may be postponed by order of the justice for a reasonable period of time. Renewals of an order of postponement may be obtained on a new showing of exigent circumstances."

13. It has been asserted that 18 U.S.C. §2519(9) compels a different conclusion. 18 U.S.C. §2518(9) provides: "The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information." This provision, however, read in the light of the last sentence of 18 U.S.C. §2518(8)(d) assumes a different aspect: "On an ex parte

We construe the statutes, 18 U.S.C. §2518(8)(d) and 18 U.S.C. §2518(10)(a)(i), as requiring the exclusion of wiretaps secured in violation of their wording which implements the Fourth Amendment. The New York authorities have, therefore, proceeded in violation of Hueston's constitutional rights as guaranteed by that Amendment.[14]

On the narrow grounds stated, we conclude, as did the district court, that the wiretap evidence must be suppressed. Accordingly, the judgment will be affirmed.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals for the Third Circuit.*

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showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed."

If the last sentence of 18 U.S.C. §2518(8)(d) be employed for continuous postponements for good cause by a judge of competent jurisdiction a situation could ensue whereby the wiretap even if issued on an invalid warrant could never be suppressed or its validity questioned and any issue presented by 18 U.S.C. §2518(10)(a)(i) could not be adjudicated for the defendant could obtain no knowledge as to the illegality of the interception on which he could base an objection. It follows therefore that 18 U.S.C. §2518(9) is intended to provide the defendant whose telephone has been subject to wiretap an opportunity to test the validity of the wiretapping authorization. In other words under the last sentence of 18 U.S.C. §2518(8)(d) valid postponements of the serving of the inventory and examination of the warrant or authorization by the defendant might continue indefinitely even up to the time of or during trial were it not for the provisions of 18 U.S.C. §2518(9). It seems logical to take the position that this was the purpose for which 18 U.S.C. §2518(9) was enacted. What we have said is equally applicable to Section 823.2 of the New York Act. Note the provision therein relating to "postponement" or "postponements" for "exigent circumstances." See note 12, *supra*. Cf. *Narducci, supra*, at ——. If our interpretation of the respective statutes be correct the basis of our reasoning in suppressing the wiretaps is sound.

14. We do not, of course, pass upon the constitutionality of the Federal statute. That issue is not before us. It has been held unconstitutional by Chief Judge Lord in the Eastern District of Pennsylvania, in *United States v. Whitaker*, Crim. Nos. 70-324 and 70-515, — F. Supp. — (5/31/72). See, however, the decisions cited in note 5 of *Whitaker* holding the statute constitutional.

## APPENDIX D
## OPINION OF UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MUIR, District Judge.

The defendant Hueston, also known as Tony DeJest, has been indicted for the unlawful manufacture of drugs in violation of 21 U.S.C. 331(q)(1). He has moved to suppress the contents of intercepted telephonic communications and evidence derived therefrom. The motion will be granted.

On June 2, 1969, upon application of the District Attorney of Rockland County, New York, a judge of that county issued an order authorizing the interception of the defendant's telephone communications over a given telephone number. The judge concluded his order with the statement ". . . notice to the said Tony DeJest . . . is hereby expressly waived." The telephone line was tapped during June and July, 1969, pursuant thereto.

The United States Attorney has given notice to the defendant that he intends to use evidence derived from the wiretap in the defendant's forthcoming trial.

It is admitted that the issuing judge never caused to be served on the defendant the inventory, including notice, as required by 18 U.S.C. §2518(8)(d) and he never postponed the service thereof as he might have done under that section. The order indicates that the issuing judge intentionally eliminated the service of the inventory and notice.

The government takes the position that the failure to serve the inventory and notice is not fatal. My view is otherwise.

Any electronic surveillance of telephone communications is an invasion of the right of privacy. Such an invasion by

law enforcement officers in the performance of their duty is to be tolerated only in strict conformity with the Constitution and applicable statutes. To permit law enforcement agents to violate the law in the apprehension of criminals would be anamolous.

The provision for service on the defendant of an inventory and notice within ninety days of the wiretap is not meaningless. It eliminates, insofar as practicable, the possibility of completely secret electronic eavesdropping and grants to the person involved an opportunity to seek redress for an abusive interception either by a civil action for damages or by a suppression of evidence in a criminal case. The provision for service of the inventory and notice is an absolutely necessary link in the chain of protective measures built into the statute. "Standards Relating to Electronic Surveillance", American Bar Association Project on Minimum Standards for Criminal Justice, Tentative Draft of June, 1968, Comment at page 162, final draft adopted A.B.A. House of Delegates, February 8, 1971.

In *Berger vs. New York*, 388 U.S. 41 (1967), the Supreme Court struck down a New York wiretapping statute because it did not contain, inter alia, a requirement of notice to the person whose wire had been tapped. In passing, I note that the New York statute in effect at the time of the wiretap in this case, obviously enacted in response to *Berger*, requires notice to the defendant within ninety days of the termination of the tap, unless a postponement for a reasonable period of time is ordered. New York Code of Criminal Procedure, §823, effective June 5, 1968.

In my view, the failure to serve the requisite inventory and notice vitiates the wiretap and precludes the use of evidence derived therefrom.

The Defendant's other arguments for suppression of the evidence are without merit.

s/
United States District Judge

DATED: May 27, 1971

**ORDER**

May 27, 1971

In accordance with the Opinion filed this day, It is Ordered that the motion made by the defendant Hueston to suppress is hereby granted and It is further Ordered that the contents of any intercepted wire or oral communication, or evidence derived therefrom, obtained pursuant to the Order of the Supreme Court, 9th Judicial District, State of New York, dated June 2, 1969, and any extension of that Order, shall be treated as having been obtained in violation of Chapter 119, Title 18, United States Code, 18 U.S.C. 2510 et seq.

s/
United States District Judge

## APPENDIX E
## OPINION OF COUNTY COURT: COUNTY OF ROCKLAND

Hon. Robert R. Meehan, District Attorney of Rockland County, for the People.

George J. Bellantoni, Esq., attorney for Defendants.

THEODORE A. KELLY, County Judge:

Defendants, Anthony Heuston and Bonnie Kerr, move for an order suppressing the use in evidence against them of the contents of certain intercepted telephonic communications or any other evidence obtained as a result thereof pursuant to the provisions of Section 813-1 of the Code of Criminal Procedure.

Defendants have been jointly indicted for the crimes of Criminal Possession of a Dangerous Drug in the Fourth Degree and Criminal Possession of a Dangerous Drug in the Third Degree.

Upon the application of the District Attorney of Rockland County, an eavesdropping warrant was granted by the Hon. Clare Hoyt, Justice of the Supreme Court, (now deceased), on June 2, 1969, pursuant to Title III of Part 6 of the Code of Criminal Procedure. This warrant authorized the wiretapping of telephone number 352-6747, which was listed to the defendant, Bonnie Kerr, 30 South Cole Avenue in the Village of Spring Valley, for the purpose of overhearing conversations of said Bonnie Kerr (hereinafter referred to as Kerr), and the co-defendant, Tony DeJeste (hereinafter referred to as DeJeste), and of others acting "in consort with them". It was submitted that these conversations would constitute evidence of the crimes of Criminal Sale of Dangerous Drugs in the 1st, 2nd and 3rd Degrees, Possession of Dangerous Drugs in the 1st,

2nd and 3rd Degrees, Possession of Dangerous Drugs with Intent to Sell, and Criminal Conspiracy in the 3rd and 2nd Degrees. The indictment against these defendants was returned by the Grand Jury of Rockland County on August 12, 1969.

Defendants' attorney has joined in this application one Ralph Feola, (hereinafter referred to as Feola), who is alleged to have been arrested in the City of White Plains on or about August 14, 1969, and subsequently indicted by the Grand Jury of Westchester County for the crimes of Criminally Possessing a Dangerous Drug and Unlawfully Possessing Noxious Material. Defendants' attorney also represents Feola on these charges. In his moving affidavit, defendants' attorney states that on September 25, 1969, Feola was served with a notice by the District Attorney of Westchester County informing him that an eavesdropping warrant had been issued which authorized the wiretapping of his telephone in the City of White Plains. This warrant, defendants' attorney contends, was predicated upon conversations overheard between Feola and DeJeste by virtue of the order of Judge Hoyt which had authorized the wiretapping of the telephone of Kerr.

Feola's standing on this motion is based upon his alleged status as an "aggrieved defendant" within the provisions of Section 813-j of the Code of Criminal Procedure (Laws 1969, c. 1147). Subdivision 3 of Section 813-j defines an "aggrieved defendant" as an "aggrieved person" who has been named in an indictment or information that has been filed in a court having trial jurisdiction of such indictment or information. Subdivision 2 of Section 813-j describes an "aggrieved person" as a party to a conversation or discussion which was intentionally overheard or recorded, without the consent of at least one party

thereto, by a person not present thereat. Assuming that Feola is an "aggrieved defendant", however, Section 813-L, subdivision 2, of the Code of Criminal Procedure expressly requires that a motion to suppress the contents of any intercepted communication or evidence derived therefrom be made in the court having trial jurisdiction of the pending indictment. Feola has been indicted by the Grand Jury of Westchester County and the indictment is presently pending in Westchester County. Feola has not been named as a co-defendant in the indictment pending in this court against DeJeste and Kerr. His standing as an "aggrieved defendant" is predicated upon his having been named as a defendant in the Westchester County indictment. His motion, therefore, should be addressed to the Westchester County Court which has trial jurisdiction of said indictment.

With respect to the eavesdropping warrant which is the subject of this motion, defendants contend that the warrant was improperly issued for the following reasons:

(1) The affidavits submitted in support of the said warrant failed to show probable cause for the issuance thereof as required by former Section 816 of the Code of Criminal Procedure.

(2) The warrant expressly waived any notice to the defendants in violation of former Section 823 of the Code of Criminal Procedure.

(3) That the warrant was improper since it was based partly upon conversations of DeJeste which were overheard during the wiretapping of telephone number 352-5751 listed to one Marge Youmans, 130 West Eckerson Road, Spring Valley, New York. This wiretapping had been authorized by another warrant issued by Justice Hoyt on May 14, 1969, and had referred to conversations of Marge

Youmans, one Pat Phillips and one Charlie Phillips. It is also alleged that the transcripts or logs of these conversations should have been submitted to Judge Hoyt.

With reference to the requirements for the issuance of an eavesdropping warrant, former Section 816 of the Code of Criminal Procedure, provided as follows:

> "An eavesdropping warrant may issue only upon an appropriate application made in conformity with this title, and upon reasonable cause to believe that evidence of the commission of a particular crime, or information aiding in the apprehension of the perpetrator of a particular crime, may be obtained, and upon a showing that normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ, to obtain the evidence or information sought".

The Court has examined the eavesdropping warrant and the affidavits upon which it was based and finds that there was a sufficient showing of probable cause for the issuance of the warrant and that the warrant was lawfully and properly issued. The Court finds no merit to the argument of defendants' attorney that the logs or transcript of the telephone conversations which were intercepted by the tapping of telephone number 352-5751 should have been submitted to the issuing Justice. Former Sections 816 and 817 of the Code of Criminal Procedure contain no such requirements for the issuance of an eavesdropping warrant.

Similarly, the Court find no merit to defendants' contention that the interception of conversations of DeJeste by the tapping of number 352-5751, constituted an unlawful search as to DeJeste since DeJeste was not specifically named in that warrant. The Youmans' warrant was

specifically based upon a finding that the conversations of Marge Youmans, Pat Phillips and Charlie Phillips, as well as the conversations of "others acting in consort with them and using such telephone", would constitute evidence relating to crimes dealing with narcotics. Upon hearing an incriminating conversation involving DeJeste, the District Attorney possessed a statutory right to apply to the Justice who had issued the warrant for an order amending same so as to include such conversation. (former Section 822, Code of Criminal Procedure). The purpose of this section was to allow the use of unexpected conversations relating to a crime other than the one under investigation. Upon such an application, subdivision 2 (b) of former Section 822 required the applicant to state facts establishing reasonable cause to believe that such conversation constituted evidence of a particular crime. The District Attorney did not apply to amend the warrant which had authorized the tapping of number 352-5751. He did, however, apply for a new warrant and the application for same was timely. The Court finds that this procedure was proper and finds that the case of People v. Szymanski (62 Misc. 2d 1065), which has been cited by defendants' attorney, is not controlling. In Szymanski, the City Court of the City of Buffalo granted a motion to suppress where the District Attorney renewed an eavesdropping warrant and failed to mention conversations which incriminated the defendant, the overhearing of which had not been sought pursuant to the warrant. Such is not the situation in the case at bar. Here, application was made to the Justice who had issued the original warrant for the issuance of a new warrant and the affidavits in support of same made specific reference to the Youmans warrant.

Defendants have further contended that the warrant was void at its inception since it specifically provided for waiver

of notice to DeJeste and Kerr. At the time that the warrant in question was issued, Section 823 of the Code of Criminal Procedure, which has since been repealed, required personal service of written notice of the issuance of the eavesdropping warrant upon the persons named in the warrant, not later than sixty days after the termination of the warrant. In the Court's opinion this is a ministerial requirement for the purpose of notifying the person named in the warrant that the warrant had been issued and to enable him to then move to inspect the warrant and the application upon which it was based. Former Section 823 has now been codified in Section 822 of the Code (Laws 1969, Chapter 1147). There is, however, no statutory sanction provided in the event that notice of the issuance of the warrant is not served, and there is no provision in the statute to indicate that the warrant should be invalidated and voided for the failure to have served such a notice as defendants' attorney has contended. There would possibly be merit to defendants' contention had defendants not been aware that an eavesdropping warrant had been issued. However, the file in this matter indicates that defendants were well aware of the issuance of the warrant and have so stated in their affidavits in support of the motion. Further, a motion was made to obtain a copy of the warrant and the affidavits upon which it was based as early as September 26, 1969 by defendants' former attorney. To now declare the warrant invalid by reason of the fact that it expressly waived notice to the defendants, where defendants have received copies of the warrant and the application upon which it was based and have been afforded ample opportunity to attack the sufficiency thereof, would be to exalt form over substance and constitutes a theory to which this Court does not subscribe.

Accordingly, the motion is denied in its entirety.
Submit order.

s/ Theodore A. Kelly
County Judge, Rockland County

Dated: New City, New York
November 25, 1970

## APPENDIX F
## NOTICE OF MOTION

S I R :

PLEASE TAKE NOTICE, that upon the annexed Affirmation of PAUL I. AUERBACH, attorney for the Defendants herein, the undersigned will move this Court, at a Regular Term, to be held on the 29th day of September, 1969, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, at the County Courthouse of Rockland County, located at Main Street, New City, New York, for an Order directing the District Attorney to furnish to the defendants a copy of the Affirmations and/or Affidavits used in support of obtaining a Wire Tap Order, the Wire Tap Order itself and the return on the Wire Tap Order and for such other and further relief as to this Court may seem just and proper.

### AFFIRMATION OF PAUL I. AUERBACH IN SUPPORT

PAUL I. AUERBACH states as follows:

That he is an attorney duly admitted to practice law in the State of New York and that he makes the following Affirmation knowing full well the penalties for perjury.

That the information contained in this Affirmation is based on the affirmant's own knowledge or upon information and belief and conversations held with the Defendants herein.

That your affirmant did call the office of the District Attorney of Rockland County to request the copy of the Affirmations and/or Affidavits and Order and return on the Order used to get the Search Warrant with reference to the above-captioned case.

That upon conversing with the secretary in the District Attorney's Office your affirmant was advised that anything that your affirmant desires from the District Attorney should be requested in a formal Motion before this Court.

That your affirmant did send the Defendants in this case to the County Courthouse in Newburgh in order to obtain a copy of the Affirmation and Search Warrant.

That your affirmant received a telephone call from the secretary of the Judge that issued the Warrant to the effect that a copy of the Warrant, Affirmations and return on the wire tapping would have to be gotten through the District Attorney's office in Rockland County.

That your affirmant is not in any position to make any Motions with reference to this case or these cases unless and until your affirmant has a chance to review the Affirmations and the bases of the Wire Tap Order with relation to the Search Warrant and return on the Warrant.

WHEREFORE, your affirmant respectfully requests that an Order be signed, granting your affirmant the relief herein requested to receive copies of the Wire Tap Order, Affirmations and return.

s/ Paul I. Auerbach
PAUL I. AUERBACH

## APPENDIX G
## AFFIRMATION OF HERMAN J. VAN der LINDE

STATE OF NEW YORK)
)::s::
COUNTY OF ROCKLAND)

HERMAN J. VAN der LINDE, an attorney at law of the State of New York, hereby affirms under the penalties of perjury.

I am Sr. Assistant District Attorney of Rockland County and have read the supporting affidavit in support of defendant's motion to furnish to the defendants a copy of the affirmations and/or affidavits used in support of obtaining a Wire Tap Order, and make this affirmation with respect thereto.

1. That the affidavit of the defendant's attorney is not sufficient to create an issue or to form a basis for granting the relief granted in the motion.

2. That there is no provision in the Code of Criminal Procedure or other statutes of the State of New York providing for divulging wire tap orders and affidavits.

3. The defendant's proper remedy would be a motion to suppress evidence. This motion should be based on defendant's affidavit and not on information and belief of his attorney.

WHEREFORE this motion should in all respects be denied.

Dated: New City, New York
October 29th, 1969

s/ Herman J. Van der Linde
HERMAN J. VAN der LINDE

## APPENDIX H
## DECISION OF COUNTY COURT
## COUNTY OF ROCKLAND

Hon. Robert R. Meehan, District Attorney of Rockland County, for the People.

Paul I. Auerbach, Esq., attorney for Defendants.

THEODORE A. KELLY, County Judge:

Defendants move for an order of discovery and inspection. Defendants have been jointly indicted for the crimes of Criminal Possession of a Dangerous Drug in the Fourth Degree and Criminal Possession of A Dangerous Drug in the Third Degree. Defendants seek an order directing the People to furnish defendants with a copy of the affidavits used in support of a certain wire tap order, together with the wire tap order itself and the return on said wire tap order. Defendants contend that they are unable to determine the feasibility of possible motions until they have first examined the wire tap order and the affidavit or affidavits upon which it was based.

The only supporting affidavit on this application is the affidavit of defendants' attorney. In this affidavit he states no facts. An application of this type should be supported by an affidavit of the party which should demonstrate some factual basis for granting the relief requested. The moving affidavit of defendants' attorney merely recites a narrative of his unsuccessful attempts to obtain a copy of the wire tap order and the affidavit and/or affidavits upon which it was based. In essence, defendants are seeking a review of the wire tap order. In such a case defendants should furnish the Court with facts establishing a situation which would warrant review. (*People v. Cohen*, 41 Misc. 2d 138) No such situation has been presented here.

Accordingly, defendants' motion is denied without prejudice, however, to defendants' right to renew their motion, if they be so advised, upon sufficient supporting papers.

Submit order.

s/ Theodore A. Kelly
County Judge, Rockland County

Dated: New City, New York
January 15, 1970

## APPENDIX I
## EAVESDROPPING WARRANT, BONNIE KERR

STATE OF NEW YORK
COUNTY OF
CITY OF

In the name of the People of the State of New York:

To ROBERT R. MEEHAN, District Attorney of Rockland County at New City, New York.

On reading the application of ROBERT R. MEEHAN, sworn to on the 2nd day of June, 1969, and the affidavit of Investigator B.M. Conklin, sworn to on the 2nd day of June, 1969, in support of such application and it appearing from the STATEMENT OF FACTS therein contained in compliance with Title III, of Part 6, the Code of Criminal Procedure, establishing that there is reasonable cause to believe that there has been, is being or is about to be committed the following crimes against the Penal Law of the State of New York, to Wit: Criminal Sales of Dangerous Drugs in the 1st, 2nd and 3rd Degrees (PL 220.20 — 220.35 — 220.30) and Possession of Dangerous Drugs with Intent to Sell (PL 220.10) and Criminal Conspiracy in the 3rd and 2nd Degrees (PL 105.05 and 105.10), and it appearing that the telephone conversations of TONY DE JESTE and BONNIE KERR on New York Telephone Company number 352-6747 listed to BONNIE KERR at 30 South Cole Avenue, Village of Spring Valley, County of Rockland, New York, and the conversations of others acting in consort with them and using such telephone will constitute evidence of such crimes or that such conversations will aid in the apprehension of the perpetrators of such crimes and it appearing that such

conversations may be obtained by the wiretapping of telephone number EL2-6747, listed in the records of the New York Telephone Company to BONNIE KERR, 30 South Cole Avenue, Village of Spring Valley, New York, that other means have been tried and have failed to obtain the said evidence; and

You or any other person or persons expressly designated by you for the purpose are therefore commanded to obtain by the wiretapping of said telephone lines all conversations pertaining to the said crimes and the conspiracies to commit the various crimes; and

Are further commanded that such Eavesdropping shall take effect on June 2, 1969, or as soon thereafter as is reasonably practicable and that such eavesdropping shall not cease after any one or more of the above described conversations shall have been overheard, but shall cease at the close of the twentieth calendar date after the above mentioned, To Wit: One June 22, 1969, or on the day thereafter which is twenty (20) calendar days after the date of actual installation, whichever last occurs and that such eavesdropping may be conducted at all hours of the day and night; and

You, or any other person expressly designated by you for the purpose are further commanded that this Warrant shall be executed as soon as may be practicable and that within fourteen (14) days after the termination of this warrant or the last renewal of it, you or the person or persons expressly and particularly designated by you to execute this warrant shall make a return to me in accordance with the provisions of the said Title III, of Part 6, the Code of Criminal Procedure.

That notice to the said TONY DEJESTE and BONNIE KERR is hereby expressly waived.

DATED: This 2nd day of
June, 1969

s/
JUSTICE OF THE SUPREME COURT
NINTH JUDICIAL DISTRICT

**AFFIDAVIT OF ROBERT R. MEEHAN, IN SUPPORT**

ROBERT R. MEEHAN, being duly sworn, deposes and says:

That pursuant to Sections 816 and 817 of the Code of Criminal Procedure, he hereby makes application that an Eavesdropping Warrant be issued to permit him or the Investigator BRUCE M. CONKLIN, a member of the New York State, Division of State Police Expressly designated by him for the purpose to wiretap Telephone Number 352-6747, listed in the records of the New York Telephone Company to BONNIE KERR at 30 South Cole Avenue, Village of Spring Valley, New York, and that said warrant shall continue for a period of 20 days beginning June 2, 1969 or as soon thereafter as is reasonably practicable: and that such wiretap be continued at any and all times of the day and night. That the facts hereinafter set forth in support of this application are based upon information and belief, the source of such information and the basis for such belief being the affidavit of Investigator BRUCE M. CONKLIN of the New York State Police hereto attached.

That the following STATEMENT OF FACTS is true to the best of his knowledge and belief:

(1) That on May 8, 1969, he met Charlie Phillips, BONNIE PHILLIPS and MARGE YOUMANS at the

Plaza Diner, Nanuet, New York and purchased 1/2 ounce of "SPEED"/"AMPHETAMINE"/ for $75.00 from the above stated three persons. At that time he had a conversation with the said CHARLIE PHILLIPS concerning buying "HEROIN" in large quantities.

(2) That as is indicated by the supporting affidavit of BRUCE M. CONKLIN, an eavesdropping warrant was issued by the Honorable Clare Hoyt, Supreme Court Justice, 9th Judicial District, on May 14, 1969, for Telephone Number 352-5751 listed to MARGE YOUMANS at 130 West Eckerson Road, Spring Valley, New York and that on and after May 14, 1969, the conversations over the said Telephone Number 352-5751 were legally intercepted.

(3) That on May 17, 1969, BRUCE M. CONKLIN spoke to CHARLIE PHILLIPS and CHARLIE PHILLIPS stated that he had talked to the "Big Man" and that everything was set for Sunday and to call him on Sunday afternoon.

(4) That on May 20, 1969, a monitored telephone conversation pursuant to the aforementioned eavesdropping warrant was over heard between CHARLIE PHILLIPS and one TONY DeJESTE over Telephone Number 352-5751. CHARLIE PHILLIPS telephone TONY DeJESTE at 352-6747 which Telephone Number is listed to BONNIE KERR at 30 South Cole Avenue, Village of Spring Valley, New York, the lady with whom TONY DeJESTE resides. This conversation pertained to an order of dangerous drugs which was to be delivered to TONY DeJESTE on May 23 or 24, 1969 and further delivered to CHARLIE PHILLIPS by TONY DeJESTE on Sunday, May 25, 1969. The conversation was in reference to the prices of the Drugs, Heroin and Speed.

(5) That on May 20, 1969, a monitored telephone conversation pursuant to the aforementioned

eavesdropping warrant was overheard between CHARLIE PHILLIPS and a person by the name of NORMAN over telephone number 352-5751 indicating that NORMAN'S supply of drugs would be in on Sunday, May 25, 1969, thus directly relating this conversation to the aforementioned conversation with said TONY DeJESTE.

(6) That on May 28, 1969, BRUCE CONKLIN telephoned 352-5751 and using his code name "HAPPY JACK" he spoke to BONNIE PHILLIPS who stated that CHARLIE PHILLIPS could not fill his order of narcotics to wit: one ounce of "HEROIN" for $900.00 and one ounce of "SPEED" for $125.00 until Sunday, May 25, 1969. The fact that this order could not be filled until Sunday, May 25, 1969 was further indication that TONY DeJESTE is the source of supply for CHARLIE PHILLIPS' Narcotic business.

(7) That on May 25, 1969, BRUCE CONKLIN spoke to CHARLIE PHILLIPS over Telephone Number 352-5751 at which time he advised BRUCE CONKLIN that he would have the stuff, indicating his order of dangerous drugs and would meet him at Don's Plaza Diner, Nanuet, N.Y. on May 26, 1969.

(8) That on May 25, 1969, a monitored telephone conversation pursuant to the aforementioned eavesdropping warrant was overheard between CHARLIE PHILLIPS and the said TONY DeJESTE over telephone number 352-5751. CHARLIE PHILLIPS telephoned TONY DeJESTE at 352-6747 listed to BONNIE KERR at 30 South Cole Avenue, Apartment 3L, Village of Spring Valley, New York, during which conversation TONY DeJESTE advised CHARLIE PHILLIPS that he had taken 10 ounces of the stuff to New York City and that the other 10 ounces were in route to the city at that time for a sale to

another party and he advised CHARLIE PHILLIPS that he had not come through with the money he owed him, so the said TONY DeJESTE closed a deal with another party to get rid of the stuff indicating "HEROIN" for $700.00 an ounce. CHARLIE PHILLIPS told TONY DeJESTE that he had done him wrong since he had a customer, presumably BRUCE CONKLIN, waiting for the stuff. TONY DeJESTE further advised CHARLIE PHILLIPS during that telephone conversation that the stuff had come in by plane and the transporter was presently in a local motel in the Rockland County area.

(9) That on May 27, 1969, a monitored telephone conversation pursuant to the aforementioned eavesdropping warrant, was overheard between MARGE YOUMANS and the said TONY DeJESTE over telephone number 352-5751. MARGE YOUMANS telephone TONY DeJESTE at 352-6747 which telephone number is listed to BONNIE KERR at 30 South Cole Avenue, Spring Valley, New York and she told TONY DeJESTE that CHARLIE PHILLIPS had a guy waiting for his stuff and TONY DeJESTE then advised her that he would have nothing until May 29 or 30, 1969.

(10) That as a result of the aforesaid investigation, it is apparent that a narcotic business is being operated under telephone number 352-6747 listed to BONNIE KERR at 30 South Cole Avenue, Spring Valley, New York and that continued under-cover and surveillance work could be both dangerous and possibly harmful to the investigation.

(11) That the said TONY DeJESTE is committing crimes against the Penal Law of the State of New York, to wit: Criminally Selling a Dangerous Drug in the Second Degree (PL 220.35) and conspiracy to commit various violations of article 220 of the Penal Law of the State of New York.

(12) That the type of conversation sought to be overheard over the telephone number 352-6747 pertain to the crimes hereinbefore specified concerning the sale of narcotic drugs and conspiracies to commit these various crimes.

(13) That the specific location where, the times when, and the person with or in respect to whom the crimes aforesaid are being, have been, or will be committed, have not been legally proved and normal investigative procedures appear to be unlikely to succeed if tried.

(14) That the conversations mentioned are not privileged under any statute or constitutional provision except against Eavesdropping without an Eavesdropping Warrant.

(15) That it cannot be determined with any degree of certainty when the conversations or discussions of the type sought to be overheard will occur and that no one such conversation or discussion will constitute the evidence sought.

(16) That no previous application has been made for Eavesdropping Warrant in respect to telephone number, 352-6747 listed under BONNIE KERR at 30 South Cole Avenue, Spring Valley, New York.

s/ Robert R. Meehan
ROBERT R. MEEHAN
District Attorney

Signed and sworn to
before me this 2nd day
of June, 1969.

## AFFIDAVIT OF BRUCE M. CONKLIN, IN SUPPORT

BRUCE M. CONKLIN, being duly sworn, deposes and says:

That he is an Investigator with the Bureau of Criminal Investigation of the New York State Police, Troop F, Middletown, New York.

That on 5/14/69, a ex-parte order, as a result of a narcotics investigation being conducted in Rockland County, was issued by Supreme Court Justice Honorable CLAIR HOYT, 9th Judicial District, as so executed at telephone number 352-5751, located at 130 West Eckerson Road, Spring Valley, New York. As a result of the ex-parte order, conversations regarding the illicit traffic in narcotics is being conducted over and through 352-5751, located 130 West Eckerson Road, Spring Valley, New York, and 352-6747, located at 30 South Cole Avenue, Spring Valley, New York. That violations of the Dangerous Drug Statutes of the State of New York, Sections 220.10, 220.30, 220.20, and 220.35 of the Penal Law of the State of New York are being committed on the premises at 30 South Cole Avenue, Spring Valley, New York and particularly on telephone number 352-6747.

That such belief is based on the following facts which are of his own personal knowledge and which have been communicated to him in his capacity as an Investigator, New York State Police, Troop F. Middletown, New York, through regular police communications and intelligence as follows:

1. That on May 8, 1969, I met CHARLIE PHILLIPS, BONNIE PHILLIPS and MARGE YOUMANS at the PLAZZA DINER, Nanuet, New York and purchased one half ounce of speed/amphetamine/ for $75.00 from the

above stated three persons. At which time a conversation was held with CHARLIE PHILLIPS concerning buying heroin in large quantity.

2. That on 5/17/69, I spoke to CHARLIE PHILLIPS telephonically at 352-5751. CHARLIE PHILLIPS stated that he had talked to the big man and that everything was set for Sunday, to call him Sunday afternoon.

3. That on 5/20/69, a monitored telephone conversation was overheard between CHARLIE PHILLIPS and one TONY DeJESTE over telephone number 352-5751. CHARLIE PHILLIPS telephoned TONY DeJESTE at 352-6747, which telephone number is listed to BONNIE KERR at 30 South Cole Avenue, Spring Valley, New York, the lady with whom TONY DEJESTE resides. His conversation with CHARLIE PHILLIPS revealed that an order of Dangerous Drugs would be in by Friday or Saturday, indicating a delivery of drugs on 5/23/69 or 5/24/69, but indicated to CHARLIE PHILLIPS that he would make a delivery on Sunday, 5/25/69, indicating that he did not wish to encounter any problems and this conversation also covered the price of the drugs as $10.00 and $5.00 concerning ounces and half ounces of Heroin and Speed. Since my experiences in the field of narcotic drugs and since I have personally done business with CHARLIE PHILLIPS, I know that the indicated price of $10.00 is actually $1,000.00 and the price of $5.00 is actually $500.00.

4. That on 5/20/69, I monitored a telephone conversation over telephone number 352-5751 from CHARLIE PHILLIPS to a person by the name of NORMAN, advising NORMAN that the stuff, indicating drugs, would be in on Sunday, that it was real good stuff. The conversation also included the cutting and selling prices of Heroin. Since CHARLIE PHILLIPS has indicated to NORMAN that the stuff will be in on Sunday, this conversation is directly

related to the conversation with TONY DEJESTE in paragraph #3 of this affidavit in which TONY advised that the stuff would be ready for sale Sunday, further indicating that he is the source of supply for CHARLIE PHILLIPS' dangerous drugs business.

5. That on 5/20/69, I telephone CHARLIE PHILLIPS at 352-5751, using my code name of "HAPPY JACK" and the man from Jersey and requesting to speak to LONELY, the code name for both CHARLIE and PAT PHILLIPS. I spoke to BONNIE PHILLIPS who stated that CHARLIE could not have my order of narcotics, one ounce of Heroin at $900.00 and an ounce of Speed at $125.00, until Sunday, 5/25/69, further indicating that TONY DEJESTE is the source of supply for CHARLIE PHILLIPS' narcotics business, since conversations in paragraph #3 of this affidavit indicated that TONY DEJESTE would deliver the dangerous drugs to CHARLIE PHILLIPS on May 25, 1969.

6. That on May 25, 1969, I contacted and spoke to CHARLIE PHILLIPS over telephone number 352-5751, at which time he advised me that he would have the stuff, indicating my order of dangerous drugs, and would meet me at DONS PLAZA DINER, Route 59, Nanuet, New York on May 26, 1969 at 2:00 p.m.

7. That on May 26, 1969, I monitored a call over telephone number 352-5751 in which CHARLIE PHILLIPS telephoned TONY DEJESTE at 352-6747, listed to BONNIE KERR at 30 South Cole Avenue, Apartment 3L, during which conversation TONY advised CHARLIE that he had taken ten ounces of the stuff to New York City and that the other ten ounces was enroute to the City at this time for a sale to another party advising CHARLIE that he did not come through with the money he

owed TONY, so TONY closed a deal with another party to get rid of the stuff, indicating Heroin, for $700.00 an ounce. CHARLIE said that TONY had done him wrong since he had customers waiting for their stuff but was advised by TONY that he would take care of an ounce of stuff by Tuesday, May 27, 1969, for CHARLIE'S customer, which customer is myself. He further advised CHARLIE that the stuff had come in by plane and the transporter was presently at a local motel in the Rockland County area.

8. That on May 27, 1969, MARGE YOUMANS telephone from 352-5751 to 352-6747, listed to BONNIE KERR at 30 South Cole Avenue, Spring Valley, New York, Apartment 3L, and spoke to TONY DEJESTE telling him that CHARLIE had a guy waiting for his stuff, TONY now advised that he would have nothing until May 29, 1969 or Friday, May 30, 1969.

9. That as this type of operation functions mainly over the telephone at premises at 30 South Cole Avenue, Apartment 3L, Spring Valley, New York, over telephone number 352-6747, and since a surveillance type of investigative technique will not produce the evidence desired;

10. That in view of the results of this investigation by your deponent, and other police officers associated with him concerning narcotic and/or dangerous drugs investigation, it is believed that evidence will be obtained concerning the possession and sale of dangerous drugs by the interception and seizure of conversations over telephone number EL 2-6747.

11. That such interception and seizure would be of conversations material and relevant to this dangerous drugs possession and/or sales of dangerous drugs and all

materials and records pertinent to this narcotic and/or dangerous drug business.

s/ Bruce M. Conklin
BRUCE M. CONKLIN

Subscribed and sworn to
before me this 29th day of May, 1969.

## APPENDIX J
## EAVESDROPPING WARRANT, MARGE YOUMANS

STATE OF NEW YORK
COUNTY OF
CITY OF

In the name of the People of the State of New York:

To ROBERT R. MEEHAN, District Attorney of Rockland County at New City, New York.

On reading the application of ROBERT R. MEEHAN, sworn to on the 13th day of May, 1969, and the affidavit of Investigator B.M. Conklin, sworn to on the 13th day of May, 1969, in support of such application and it appearing from the STATEMENT OF FACTS therein contained in compliance with Title III, of Part 6, of the Code of Criminal Procedure, establishing that there is reasonable cause to believe that there has been, is being or is about to be committed the following crimes against the Penal Law of the State of New York, to Wit: Criminal Sales of Dangerous Drugs in the 1st, 2nd and 3rd Degrees (PL 220.20 — 220.35 — 220.30) and Possession of Dangerous Drugs with Intent To Sell (PL 220.10) and Criminal Conspiracy in the 3rd and 2nd Degrees (PL 105.05 and 105.10), and it appearing that the telephone conversations of PAT PHILLIPS, CHARLIE PHILLIPS and MARGE YOUMANS On New York Telephone Company number EL2-5751 listed to MARGE YOUMANS at 130 West Eckerson Road, Village of Spring Valley, County of Rockland, New York, and the conversations of others acting in consort with them and using such telephone will constitute evidence of such crimes or that such conversations will aid in the apprehension of the perpetrators of such crimes and it appearing that such conversations

may be obtained by the wiretapping of telephone number EL2-5751, listed in the records of the New York Telephone Company to MARGE YOUMANS, 130 West Eckerson Road, Village of Spring Valley, New York, that other means have been tried and have failed to obtain the said evidence; and

Your or any other person or persons expressly designated by you for the purpose are therefore commanded to obtain by the wiretapping of said telephone lines all conversations pertaining to the said crimes and the conspiracies to commit the various crimes; and

Are further commanded that such Eavesdropping shall take effect on May 15, 1969, or as soon thereafter as is reasonably practicable and that such eavesdropping shall not cease after any one or more of the above described conversations shall have been overheard, but shall cease at the close of the twentieth calendar date after the above mentioned, To Wit: On May 15, 1969, or on the day thereafter which is twenty (20) calendar days after the date of actual installation, whichever last occurs and that such eavesdropping may be conducted at all hours of the day and night; and

You, or any other person expressly designated by you for the purpose are further commanded that this Warrant shall be executed as soon as may be practicable and that within fourteen (14) days after the termination of this warrant or the last renewal of it, you or the person or persons expressly and particularly designated by you to execute this warrant shall make a return to me in accordance with the provisions of the said Title III, of Part 6, the Code of Criminal Procedure.

That notice to the said PAT PHILLIPS, CHARLIE

PHILLIPS and MARGE YOUMANS Is hereby expressly waived.

DATED: This 14th day of
May, 1969.

s/
JUSTICE OF THE SUPREME COURT
NINTH JUDICIAL DISTRICT

## APPENDIX K
## ORDER ON REMITTITUR OF THE COURT OF APPEALS

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on October 9, 1974.

HON. FRANK A. GULOTTA, *Presiding Justice*
HON. JAMES D. HOPKINS
HON. HENRY J. LATHAM
HON. ARTHUR D. BRENNAN
HON. A. DAVID BENJAMIN, *Associate Justices*

The above named The People of the State of New York, respondent in this action, having appealed to the Court of Appeals of the State of New York from an order of this court dated August 13, 1973, reversing on the law (a) two orders of the County Court, Rockland County, dated December 3, 1970 and March 1, 1971, respectively, both of which denied defendants' applications to suppress certain evidence, and (b) a judgment of the same court, rendered April 20, 1971, which convicted defendants of certain crimes, after a jury trial, and imposed sentence; the said appeal having been heard and determined by the Court of Appeals and that court having adjudged that the order of this court so appealed from be reversed and having remitted the case to this court for its consideration of the facts, if any; and after due deliberation, and upon this court's decision slip heretofore filed and made a part hereof, it is

ORDERED that the said orders and judgment of the

County Court, Rockland County, are hereby unanimously affirmed.

Enter:

IRVING N. SELKIN

Clerk of the Appellate Division.

## APPENDIX L
## CERTIFICATE DENYING LEAVE

I, SOL WACHTLER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Mineola, New York
October 30, 1974

s/ Sol Wachtler
Associate Judge

*Description of Order: Judgment of County Court, Rockland, dated April 20, 1971; affirmed by Appellate Division, Second Department, dated October 9, 1974.

FEB 27 1975

MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

**October Term, 1974.**

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No. 74—934.

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STATE OF NEW YORK,

*Respondent,*

*against*

ANTHONY HUESTON, also known as TONY DEJEST and BONNIE KERR,

*Petitioners.*

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## Brief for Respondent in Opposition to Petition for Writ of Certiorari.

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KENNETH GRIBETZ,
*District Attorney, County of Rockland,*
*Counsel for Respondent,*
Rockland County Court House
New City, N. Y. 10956
(914) 638-0500.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-934

STATE OF NEW YORK,

*Respondent,*

*against*

ANTHONY HUESTON, also known as Tony DeJest and BONNIE KERR,

*Petitioners.*

**Brief for Respondent in Opposition to Petition for Writ of Certiorari.**

**Jurisdiction.**

The petition for certiorari assets that the denial of petitioners' motion for a certificate granting leave to further appeal to the New York Court of Appeals, dated October 30, 1974 (Petition p. 2), "* * * is a determination by the highest State Court in which a decision could be had."

The point cannot be sincerely pressed since petitioners are still litigating this matter in the appellate courts of New York State; and petitioner, Bonnie Kerr, has an appeal pending in the Court of Appeals (2d Circuit) from the decision of United States District Judge Inzer B. Wyatt, denying a Writ of Habeas Corpus.

Set forth in respondent's appendix are the various applications presented to the lower courts by petitioners

which have brought about a striking inconsistency in position, in contrast to the above statement that a final disposition has been had, and reflecting the ongoing presentation of their cause in the New York Appellate Division, Second Judicial Department, and the Federal Court of Appeals.

Brought about by petitioner's conflicting positions, respondent's arguments require similar variance. Respondent submits that this Court lacks jurisdiction to entertain the petition for the first reason, namely, that a final judgment or decree exists, and, the petition has not been timely filed pursuant to Rule 22, subdivision 2 Revised Rules of the Supreme Court of the United States.

In its order of May 2, 1974 (Petitioners' Appendix A), the New York Court of Appeals in denying petitioners' motion to suppress the evidence, ordered, "the matter remitted to the Appellate Division for further proceedings in accordance with this opinion (i. e., for consideration of questions of fact, if any, raised on the appeal to that Court [see C.P.L. 470.25 subd. 2, par. (d); 470.40, subd. 2, par. (b)])."

In so remitting, the function and authority of the Court of Appeals ceased, since, on the remand, any questions of fact were to be determined by the Appellate Division, and they would not be further reviewed by the Court of Appeals under the well-established and strictly-adhered-to rule that the New York State Court of Appeals will not in non-capital criminal cases consider questions of fact (Cohen-Karger, "The Powers of the New York Court of Appeals." Scope of Review in non-capital cases, p. 742, Section 198 [a]):

> "In non-capital cases only questions of law, properly presented by the record, are open for review in the Court of Appeals; the Court has no power to review questions of fact." (citing footnote cases.)

On the remittitur, the Appellate Division in a decision and order dated October 9, 1974 (Respondent's Appendix A), affirmed the County Court order and judgment, constrained by the Court of Appeals; no questions of fact were raised or passed upon.

The conclusion is authorized that neither the May 2, 1974 order of the Court of Appeals, nor the October 9, 1974 order of the Appellate Division were of interlocutory or intermediate nature. Under the most favorable aspect of either order, or either date, it is at once apparent that the petition by virtue of the 90-day limitation is untimely and this Court lacks jurisdiction to entertain it; the time for applying for the petition has not been extended nor any application for extension presented.

**Pending Appeals.**

Petitioners insist that they still have remedies available to them which they are pursuing; by orders to show cause, dated December 2, 1974, issued by the Hon. Frank A. Gulotta, Presiding Justice, Appellate Division, Second Judicial Department, New York, both petitioners, in separate applications sought stay of execution; the ground for the application was the claim, by both, that they had been inadequately represented by counsel; petitioner, Kerr, claiming counsel was indifferent to her interests over the five-year period he had represented her because his fee had been paid by petitioner, Hueston; the latter asserting that counsel displayed "demonstrated incompetence in handling the trial, and the subsequent appeals." We reproduce the initial Order to Show Cause

by petitioner, Hueston; the Order to Show Cause by petitioner, Kerr, is similar in content, and somewhat more restrained (Respondent's Appendix B).

The counsel so charged is none other than George J. Bellantoni, Esq., who represented both petitioners since late 1969; recently represented them in an application, dated November 14, 1974, to this Court for a stay of execution pending certiorari which was denied by the Hon. Thurgood Marshall, and who appears as counsel on this petition.

The applications to the Appellate Division for stay pending reargument were denied; however, permission was granted petitioners to present their claims to the trial court (County Court, Rockland County, New York); the orders appear in Respondent's Appendix C.

Petitioners next instituted by orders to show cause issued by the County Court, proceedings to vacate their sentences and the judgment, claiming illegal sentencing; incompetent counsel, and a failure of counsel to protect their rights, thereby depriving them of due process (Respondent's Appendix D).

The County Court, Rockland County, rendered its decision, and entered its order on January 6, 1975; after denying the applications for re-sentence and vacatur of the judgment, the Court took the occasion to volunteer that:

> "It would appear from the trial record that there was error regarding the admission of certain evidence which would not only present grounds for appeal, but, in this Court's opinion, might constitute reversible error."

To reargue the appeal, the County Court (to some court), "respectfully urged that the interests of justice and the fundamental principles of justice demand that such an application be made in the appropriate forum" (Respondent's Appendix E).

Thus encouraged, petitioners returned to the Appellate Division, again by order to show cause issued January 8, 1975, for the relief denied them by the County Court; the Appellate Division, in treating the applications, considered them as seeking permission to appeal the County Court denial, and granted petitioner's leave to appeal to the Appellate Division (Respondent's Appendix F).

The orders, and certificates granting leave are set forth in Respondent's Appendix G.

In addition to the foregoing activities, petitioner, Kerr, moved by order to show cause, issued out of the United States District Court for the Southern District of New York, by the Hon. Inzer B. Wyatt, dated December 3, 1974, for writ of habeas corpus, claiming violation of her Fourth, Fifth, and Fourteenth Amendment constitutional rights (Respondent's Appendix H).

The petition was denied, Judge Wyatt stating that "a certificate of probable cause will issue (28 U. S. C., Sec. 2253)" (Respondent's Appendix I).

Petitioner Kerr, has duly filed a notice of appeal to the Court of Appeals (2d Circuit) on January 27, 1975 (Respondent's Appendix J).

## ARGUMENT.

### POINT I.

The rules of this Court require that a petition for writ of certiorari must be filed within ninety days after the entry of judgment in a state court of last resort in a criminal case.

The judgment of the New York Court of Appeals in this matter is dated May 2, 1974; there remained no other issue or question before that court—it not being empowered to review any questions of fact petitioners raised on the whole appeal to the Appellate Division.

No questions of fact were presented to the Appellate Division, either arising from the trial, or the hearing on the eavesdropping warrant; it is obvious from the Court of Appeals judgment that it did not intend to consider or determine any further than its remittitur reads; that its determination, insofar as the Court of Appeals was concerned was a final disposition of the case.

Consequently petitioners' efforts to review that judgment by filing this petition runs afoul of the cited rule, and deprives the Court of jurisdiction to entertain it; the application for leave to further appeal was a vain act and did not serve to extend the time for filing the petition since the Court of Appeals expressly rejects a review of factual questions, which as stated, were not at all involved in the prosecution of petitioners' appeals.

## POINT II.

It is a safe assumption, from the above applications, that petitioners are not at all convinced that they have exhausted all state, or lower court remedies; overlooked or ignored by petitioners is the fact that they have pending, leave to reargue their claims in the New York Appellate Division, and, review by appeal to the Second Circuit Court of Appeals of the denial of the writ of habeas corpus; there are, therefore, through the medium of successive applications, petitions, or appeals, three separate forums for relief from the sentence and judgment.

Anomalous indeed, is the piecemeal approach adopted by petitioners in representing to the lower appellate courts, both state and federal, their newly-arrived-at claims of inadequacy of counsel, and deprivation of rights and due process; from the diversity and persistency of their applications, if the same are rejected in the lower courts, surely further appellate process can be anticipated, thus further fragmenting their claimed grievances.

### Statement of the Case.

On June 2, 1969, an eavesdropping warrant was issued by the late Honorable Clare J. Hoyt, Justice of the Supreme Court, Ninth Judicial District (and now deceased as of February 20 1970); the warrant was issued at the instance of the New York State Police and authorized the tapping of respondent Kerr's telephone. The concluding paragraph of the warrant read as follows:

> "That notice to the said Tony DeJeste and Bonnie Kerr is hereby expressly waived." (Heuston was known as "DeJeste.")

The warrant was to be effective for a twenty (20) day period, expiring at the close of the calendar day, June 22, 1969; subsequently additional supporting affidavits were submitted to Justice Hoyt, and the original warrant was extended to expire on July 10, 1969.

Grounded on information received from intercepted conversations, a search warrant was issued on July 5, 1969, authorizing the search of the premises of petitioner Kerr, the place of installation of the tapped telephone.

On July 10, 1969, the search warrant was executed by the State Police at Kerr's apartment in Spring Valley, New York. The seizure consisted of drugs and drug chemicals, and a quantity of slugs designed for use in vending machines. Indictments were returned against both petitioners on August 12, 1969; Kerr for Criminal Possession of Dangerous Drugs, Third and Fourth Degrees, and Heuston on the same charges; in addition by separate indictment Heuston was charged with illegal possession of the coin-machine slugs.

Petitioners were tried on the indictments in the County Court, Rockland County, and a guilty verdict rendered against both on March 11, 1971. Sentence was imposed on April 21, 1971; Kerr, on conviction of Possession, Third Degree, received a sentence of one (1) years in the Rockland County Jail; for Possession, Fourth Degree, a sentence of six (6) months in the County Jail, to run concurrently. Heuston, for Possession, Third Degree, an indeterminate sentence not to exceed four (4) years, for Possession, Fourth Degree, a sentence of one (1) year in the County Jail; for unlawful possession of the slugs, three (3) months in the County Jail, the last two sentences to run concurrently with the first sentence.

**Facts.**

Petitioners by notice of motion dated September 26, 1969, returnable September 29, 1969, moved for an order of the County Court, Rockland County, directing the District Attorney to furnish copies of the eavesdropping warrant and the affidavits used in connection with its issuance (A-35).

The motion was denied (Hon. Theodore A. Kelly, County Judge) without prejudice to renewal; the basis of the denial being failure of the moving affirmation to furnish sufficient facts upon which the requested relief could be granted. The decision of the court, dated January 15, 1970 (A-38), directed that an order be submitted. In the period between submission of the motion, and the decision, the attorney for the petitioners who had represented them from the date of arrest was substituted by new counsel. It does not appear that any implementing order was ever submitted in accordance with the decision referred to immediately above.

Substituted (and present) counsel for the petitioners, by notice of motion dated January 28, 1970, returnable February 9, 1970, brought on a motion for the same relief, the motion was granted, and in compliance with the order entered thereon copies of the requested documents were furnished.

Based on the information supplied, Petitioners' counsel, by notice of motion dated May 15, 1970, returnable August 17, 1970, moved to suppress the intercepted conversations and for the inclusion of any evidence obtained thereby. The motion was denied (decision, Petitioner's Appendix E), and the order dated December 3, 1970, entered on the decision is the first of the two orders reversed by the Appellate Division.

Thereafter, and by notice of motion dated February 18, 1971, returnable on February 22, 1971, petitioners further moved to suppress the evidence seized as the result of the search warrant which had been issued as described previously, on the basis of the intercepted conversations.

The motion was denied by the decision and order of the County Court, entered on March 1, 1971; this order was the second of the two orders reversed by the Appellate Division.

Trial and conviction of the petitioners followed. Between the conviction (March 11, 1971) and sentence (April 21, 1971), the respondent Heuston was indicted with one Eastman, in the U. S. District Court, Middle District of Pennsylvania, charged with the unlawful manufacture of drugs in violation of Federal statutes.

The Federal case was based on information and evidence supplied the Federal authorities from the intercepted conversations of the eavesdropping and search warrants involved here; copies of the warrants were furnished to the U. S. Attorney in the Pennsylvania district for examination by the District Court Judge. The documents were supplied by reason of the motion to suppress the intercepted conversations and evidence brought on by Heuston in the District Court.

The District Court granted the motion to suppress, citing the New York State and Federal Eavesdropping statutes and finding the warrant did not conform. (*United States v. Eastman,* 326 F. Supp. 1038; May 27, 1971.)

The U. S. Attorney appealed, and on appeal the U. S. Court of Appeals, Third Circuit, affirmed the order of suppression. (*United States v. Eastman,* 465 F. 2d 1057; August 8, 1972.)

Both the U. S. District Court and the U. S. Court of Appeals held the June 2nd, 1969 warrant, and the evidence obtained thereby, were to be regarded as having been obtained in violation of Chapter 119, Title 18, U. S. Code, 18 U. S. C. §2510, *et seq.,* and were therefore deemed inadmissible in the Federal prosecution of the respondent Heuston. Consequent on the decision, the U. S. Attorney caused the Federal indictment against Heuston to be dismissed on February 14, 1973.

The majority opinion of the Appellate Division agreed with the Federal holdings on the inadmissibility of the warrant, and evidence; the Appellate Division ordered a new trial for both petitioners.

Injected into the case for the first time are allegations and statements made concerning an eavesdropping warrant issued to one Marge Youmans (Brief, p. 12); the claimed infirmity of the Youmans warrant it is argued, has tainted the warrant under consideration; nowhere in the prolonged history and litigation of this case has the point been presented for initial judicial consideration—nor has any reliance thereon hitherto been asserted; respondent would urge the presentation of that warrant as another instance of fractionalized contentions which have neither been offered for adversary presentation, or opportunity to challenge the facts as alleged; the rescurrection of that warrant, at this time, is most inappropriate—an unsubstantiated unproved desperate gesture.

## ARGUMENT.

## POINT III.

### The decision of the New York State Court of Appeals is supportable.

The heart of the Court of Appeals, Third Circuit decision appears as follows (p. 1062) (Appendix C):

> "The touchstone of our decision on this aspect of the case at bar is not one in which an inventory was delayed but rather is one in which specific provisions of Title III were deliberately and advertently not followed.
>
> "In other words the failure to file the notice or inventory is no mere ministerial act. It resulted from a judicial act which on its face deliberately flouted and denigrated the provisions of Title III designated for the protection of the public. This we cannot countenance. The communications were unlawfully intercepted. Therefore, the provisions of §2518(10) (a) (i) apply and the motion to suppress must be granted."

To accept this harsh construction of the judicial supervision of the warrant by the late Justice Hoyt would attribute to him an utter disregard of the statutes in effect at the time. It should be borne in mind that the Title III Eavesdropping Warrant statutes were extensively amended or repealed by the New York State Legislature in an effort to follow the guidelines governing eavesdropping set by the U. S. Supreme Court; the changes were frequent, and successively restrictive in insuring that constitutional safeguards were observed.

The warrant in question was directly in the middle of the rule changes, in fact, its duration straddled the date change of June 25, 1969. It was originally issued June

2, 1969, to expire June 22, 1969—and was extended to include July 10, 1969, when it was discontinued.

In effect at issue were the provisions of Chapter 546, Laws 1968, effective June 5, 1968, Section 823 of the Code of Criminal Procedure; without quoting in full, so much of the statute as is applicable to this appeal appears:

> "* * * Eavesdropping warrants; notice and return. 1. Not later than sixty days after termination of the eavesdropping warrant or any renewals thereof, except as otherwise provided in subdivision two of this section, written notice of issuance of the eavesdropping warrant and of the period of authorized eavesdropping must be personally served upon the person named in the warrant whose conversations were sought to be overheard, or upon the owner, lessee, or occupant, if known, of the place or premises in which the eavesdropping device was installed, or upon the subscriber to the telephone or owner or lessee, or occupant, if known, of the place or premises in which the eavesdropping device was installed, or upon the subscriber to the telephone or owner or lessee of the telegraph line described in the warrant.
>
> "2. On a showing of exigent circumstances to the issuing justice the serving of the notice required by this section may be postponed by order of the justice for a reasonable period of time. Renewals of an order of postponement may be obtained on a new showing of exigent circumstances * * *."

Chapter 1147, Laws 1969, effective June 25, 1969, enlarged the time for the sixty-day notice of the warrant, to a ninety-day period following removal or discontinuance of the wire tap: therefore under the statute, on July

10, 1969, the date of this tap removal notice of the warrant could have been properly given anytime up until October 10, 1969.

Having actual knowledge of the tap before that October date, the defendant's attorney brought on his motion for copies of the warrant and supporting affidavits on September 26th, 1969. There is nothing in the record of this prosecution by which it can be determined that the petitioners were in any way prejudiced by the omission to give the written ninety-days notice, nor has ever any such claim been presented.

There would also appear to be no solid legal ground for the very strained interpretation made by the Federal Court that by a failure to eliminate the objectionable "waiver" provision Judge Hoyt "deliberately flouted and denigrated the provisions of Title III * * *." The obvious purpose of the statement was to eliminate the giving of any advance notice of the warrant to the respondents at the time the warrant was executed. The common-sense approach was as stated in the Appellate Division dissenting opinion:

> "Indeed, such a requirement would vitiate the utility of any eavesdropping warrant."

To borrow from the Circuit Court's opinion, quoting Mr. Justice Clark in *Berger v. New York,* 388 U. S. 41, 60:

> "Finally, the statute's procedure, necessarily, because its success depends on secrecy * * *"

The dissenting opinion cites *U. S. v. Wolk,* 466 F. 2d 1143, Circuit Court of Appeals, Eighth Circuit (August 30, 1972), and an extract from that decision is fitting here

as valid reason for eliminating prior notice of any eavesdropping warrant (p. 1145):

> "However, the viability of wire-tapping as a law enforcement tool is conditioned upon secrecy before the tap."

The view of the court in *Wolk* may be summarized in the statement (p. 1145), and can be treated as embodying the principle that should obtain here:

> "Arguably, then, when a person has actual notice that his conversations have been intercepted, both the statutory and constitutional requirements have been substantially complied with.
>
> • • •
>
> "We do not believe that the use of formal inventories is an end into itself. Surely neither the Congress nor the constitution would require such emphasis of form over substance as the appellees would have us promulgate" (p. 1146).
>
> • • •
>
> "To us the statute is concerned with adequate notice and not formalities" (p. 1146).

## POINT IV.

### The error was non-prejudicial to petitioners.

In support of the motion made by respondents' attorney, Paul I. Auerbach, in the September 26th, 1969 motion, Mr. Auerbach submitted an affirmation (undated) (Petitioner's Appendix F) in which he stated:

> "That your affirmant did send the Defendants in this case to the County Courthouse in Newburgh in order to obtain a copy of the Affirmation and

> Search Warrant. That your affirmant received a telephone call from the secretary of the Judge that issued the Warrant to the effect that a copy of the Warrant, Affirmations and return on the wire tapping order would have to be gotten through the District Attorney's Office in Rockland County."

It is plain and obvious that at least on September 26th, 1969, both the petitioners and their counsel had full knowledge of the existence of the warrants; in such an instance, and no claim of prejudice ever having been raised by the lack of written notice, the "waiver notice" was a technical error and might be disregarded.

As the court declared in the *People v. Gnozzo* case (eavesdropping), 31 N. Y. 2d 134, 141:

> "Any error, if there were error, was technical and should be overlooked (cf. *People v. Glen,* 30 N. Y. 2d 252, 261-262; *People v. Varney,* 32 A. D. 2d 181)."

The same principle was earlier announced in the case cited, *People v. Glen, supra*:

> "In concluding this principal issue, it is worth repeating the admonition in *United States v. Ventresca* (380 U. S. at page 108) that the requirements of the Fourth Amendment are 'practical and not abstract' and that warrants should be scrutinized in a 'commonsense and realistic fashion.' "

Respondent, would also respectfully direct this Court's attention to the cases cited in the opinion of Judge Wyatt; *United States v. Manfredi,* 488 F. 2d 588, 601-602 (2d Cir. 1973), cert. denied, 94 S. Ct. 2651 (June 3, 1974); *United States v. Rizzo,* 492 F. 2d 443, 447 (2d Cir.), cert. denied, 94 S. Ct. 3969 (June 10, 1974), as particularly relevant to the issue presented.

## CONCLUSION.

**Based on the foregoing, respondent submits the petition should be denied.**

Dated: New City, N. Y.,
February , 1975.

Respectfully submitted,

KENNETH GRIBETZ,
District Attorney,
Counsel for Respondent,
County of Rockland,
Courthouse,
New City, N. Y. 10956

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IN THE

# Supreme Court of the United States

**October Term, 1974.**

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No. 74—934.

---

STATE OF NEW YORK,

*Respondent,*

*against*

ANTHONY HUESTON, also known as TONY DEJEST and BONNIE KERR,

*Petitioners.*

---

## RESPONDENT'S APPENDIX.

---

KENNETH GRIBETZ,
*District Attorney, County of Rockland,*
*Counsel for Respondent,*
Rockland County Court
House
New City, N. Y. 10956
(914) 638-0500.

## Index to Appendix.


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## Appendix A—Order on Remittitur of the Court of Appeals.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on October 9, 1974.

Hon. Frank A. Gulotta,
Presiding Justice,
Hon. James D. Hopkins,
Hon. Henry J. Latham,
Hon. Arthur D. Brennan
Hon. A. David Benjamin,
Associate Justices.

---

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent,*

*v.*

ANTHONY HEUSTON, also known as Tony DeJeste and BONNIE KERR,

*Appellants.*

---

The above named The People of the State of New York, respondent in this action, having appealed to the Court of Appeals of the State of New York from an order of this court dated August 13, 1973, reversing on the law (a) two orders of the County Court, Rockland County, dated December 3, 1970 and March 1, 1971, respectively, both of which denied defendants' applications to suppress certain evidence, and (b) a judgment of the same court, rendered April 20, 1971, which convicted defendants of certain crimes, after a jury trial, and imposed sentence; the said

appeal having been heard and determined by the Court of Appeals and that court having adjudged that the order of this court so appealed from be reversed and having remitted the case to this court for its consideration of the facts, if any; and after due deliberation, and upon this court's decision slip heretofore filed and made a part hereof, it is

ORDERED that the said orders and judgment of the County Court, Rockland County, are hereby unanimously affirmed.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division.

*Appendix A—Order on Remittitur of the Court of Appeals*

mc

No. 3318 THE PEOPLE, etc.,

*Respondent,*

*v.*

ANTHONY HEUSTON, also known as Tony DeJeste and BONNIE KERR,

*Appellants.*

This case has been remitted by the Court of Appeals to this court. By our previous decision (1113 E/73) we reversed, on the law, (a) two orders of the County Court, Rockland County, dated December 3, 1970 and March 1, 1971, respectively, both of which denied defendants' applications to suppress certain evidence, and (b) a judgment of the same court, rendered April 20, 1971, which convicted defendants of certain crimes, after a jury trial, and imposed sentence, but the Court of Appeals reversed our order stating in its opinion that the suppression motions should be denied, and remitted the case to this court for consideration of questions of fact, if any, raised on the appeal to this court (*People v. Heuston*, 34 N. Y. 2d 116, revg. 42 A. D. 2d 860).

This court now affirms the orders and the judgment. No opinion.

Gulotta, P.J., Hopkins, Latham, Brennan and Benjamin, JJ., concur.

## Appendix B—Order to Show Cause.

SUPREME COURT OF THE STATE OF NEW YORK,

APPELLATE DIVISION—SECOND DEPARTMENT.

THE PEOPLE OF THE STATE OF NEW YORK,

*Plaintiff-Respondent,*

*against*

ANTHONY HEUSTON, also known as Tony DeJeste and BONNIE KERR,

*Defendants-Appellants.*

Present:

Upon reading the annexed affidavit of Richard T. Monahan, and upon all the pleadings and proceedings heretofore had herein,

LET the District Attorney of Rockland County show cause at a motion term of the Supreme Court of the State of New York, Appellate Division, 2d Department, to be held at the Courthouse hereof, located at Monroe Place on the 9th day of December, 1974, at 9:30 o'clock on said day or as soon thereafter as counsel can be heard, why the defendant-appellant should not have argument of the appeal and why on such reargument this court should not modify the sentence and why the defendant-appellant should not have such other, further and different relief as may be just and proper under the circumstances.

In the meantime, pending the hearing and determination of this application and the entry of an order thereon and service of a copy thereof with notice of entry, let pro-

ceedings on the part of the plaintiff-respondent herein be and hereby is stayed, except to oppose the within application; and

Sufficient reason appearing therefor, let service of a copy of this order to show cause and the annexed affidavit of Richard T. Monahan, Esq., attorney for the plaintiff-respondent herein on or before the 2nd day of December, 1974, be deemed sufficient for all purposes herein.

Dated: New City, New York
December 2, 1974

s/ FRANK A. GULOTTA
Justice of the Appellate
Division
Presiding, Second Dept.

## Appendix B—Affidavit of Richard T. Monahan.

STATE OF NEW YORK, COUNTY COURT,

COUNTY OF ROCKLAND.

---

PEOPLE OF THE STATE OF NEW YORK,

*Plaintiff,*

*against*

ANTHONY HEUSTON, also known as Tony DeJeste and BONNIE KERR,

*Defendants.*

---

State of New York,
County of Rockland, ss:

RICHARD T. MONAHAN, being duly sworn, deposes and says:

FIRST: That he has been substituted as attorney for the above named defendants, and as such. is authorized to act on their behalf.

SECOND: That he is an attorney admitted to practice in the State of New York.

THIRD: That this affidavit is submitted in support of the within motion seeking a stay pending an appeal of the conviction of Anthony Hueston, also known as Tony DeJeste, on March 11, 1971.

FOURTH: That your deponent would like to set forth a brief history of the above case in order to fully apprise this Court of the merits of this motion.

FIFTH: That defendants were jointly indicted for criminal possession of a dangerous drug in the fourth degree and criminal possession of a dangerous drug in the third degree, and were subsequently indicted on August 12, 1969.

*Appendix B—Affidavit of Richard T. Monahan*

SIXTH: Defendants then went to trial in March, 1971, and were convicted after trial for possession of dangerous drugs as a felony, possession of dangerous drugs as a misdemeanor, and possession of slugs as a misdemeanor. On April 21, 1971, defendant, Anthony Hueston, was sentenced to an indeterminate sentence not to exceed four years on a felony count, to one year in Rockland County Jail on a second misdemeanor count, and to three months in the Rockland County Jail on a third misdemeanor count. Said sentences are to run concurrently. On the same date, defendant, Bonnie Kerr was sentenced to one year in Rockland County Jail on a felony count, and up to six months in Rockland County Jail on a misdemeanor count. Said sentences are to run concurrently. A certificate of reasonable doubt was issued by Supreme Court Justice of the State of New York pending an appeal to the Appellate Division, Second Judiciary Department, State of New York. Mr. Hueston was released on $15,000.00 secured bond, and Miss Kerr was released on $2500.00 secured bond.

SEVENTH: George J. Bellantoni, Esq., who represented both defendants at the trial, undertook their appeal by serving a notice of appeal on the District Attorney of Rockland County within the 30 day period prescribed. Thereafter, Mr. Bellantoni, in attempting to perfect the appeal of the defendants, took the position that the issuance of a search warrant was obtained through information of an illegal wiretap. This was the only basis upon which the defendants' attorney presented his appeal.

EIGHTH: That it is your deponent's contention that Mr. Bellantoni demonstrated in competence because a cursory examination of the transcript of the trial indicated conviction against both defendants would be reverse as a matter of law.

NINTH: That in the case of defendant, Bonnie Kerr, that as a matter of law, the indictment against her should have been dismissed since not one shred of evidence had been put forth by the prosecution to connect her in any way at least with the felony part of the indictment.

TENTH: That the permitting in evidence of People's Exhibit 1 which purportedly contained a quantity of dangerous drugs allegedly found in the apartment of the defendants was reversible error. That during the *voir dire* of Mr. Bellantoni, the testimony adduced from the witness who had custody and control of the alleged package of drugs stated that he could not identify this as the package he had confiscated in the defendants' apartment since it did not bear his mark. The permitting of this into evidence over the defendants' objection goes right to the heart of this case.

ELEVENTH: That this motion for permission of a stay pending the appeal to the Appellate Division is made by way of Order to Show Cause because time is of the essence in that defendants have been asked to surrender to the Sheriff's Office on Monday, December 2, 1974, to begin their respective jail sentences.

TWELFTH: That Mr. Bellantoni, attorney for defendants, was well aware of these errors and the other errors committed during this trial and did nothing with reference to the appeal in protecting the rights of his clients. That justice requires that defendants be given leave to appeal this case from its broadest terms in order to protect their constitutional rights.

THIRTEENTH: That defendants should not be penalized for what their attorney should have done, but did not do. Defendants placed their trust and confidence in their attorney, expecting that he would prosecute their appeal with the ordinary degree of skill and care one would ex-

pect of an attorney practicing criminal law. Defendants have no recourse in this matter since their freedom at the present time is seriously in jeopardy and the appeal processes which under law they are entitled to were not carried out on their behalf.

FOURTEENTH: That no one would be seriously affected by granting this stay pending appeal in that Anthony Hueston for the past three years has been in business for himself in Rockland County, and has demonstrated a trustworthiness and reliability which would permit allowing him to remain at large without the fear that he would flee the jurisdiction of this court.

FIFTEENTH: That defendant, Bonnie Kerr, is now married and working and has also demonstrated over the past three years exemplary character to enable her to remain free from incarceration during the pendency of an appeal.

SIXTEENTH: That your deponent will submit for the Court's perusal his only copy of the transcript of trial which is in excess of 700 pages. The record is replete with errors that if taken singularly on their own would be grounds for reversal as a matter of law, but cumulatively, there is no question that upon a proper appeal convictions against defendants would be reversed.

SEVENTEENTH: That Mr. Bellantoni did not properly appeal this case, and not to permit the defendants the right of appeal at this time would cause an injustice, and certainly would deprive the defendants of due process and violate their constitutional rights.

EIGHTEENTH: That the District Attorney's Office has not moved to dismiss appeal for failure to prosecute, and as such, defendants' right to appeal still exists.

*Appendix B—Affidavit of Richard T. Monahan*

WHEREFORE, your deponent prays that an order be granted permiting defendants to remain free on bail pending an appeal on the merits of the trial and the conviction after trial of the defendants, and staying the Sheriff's Office from taking into custody the defendants on December 2, 1974, or in the alternative, a hearing be had as soon as possible to determine whether stay should be continued.

RICHARD T. MONAHAN

Sworn to before me this
27th day of November, 1974.
BENJAMIN M. GOLDSTEIN
Notary Public, State of New York
Sullivan County Clerk's # 104
Commission Expires March 30, 1975

## Appendix C—Orders.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on December 12, 1974.

Hon. Frank A. Gulotta,
Presiding Justice,
Hon. James D. Hopkins,
Hon. Henry J. Latham,
Hon. Arthur D. Brennan,
Hon. A. David Benjamin,
Associate Justices.

---

In the Matter

of

Bonnie Kerr,

*Petitioner,*

Hon. Robert R. Meehan, District Attorney, Rockland County,

*Respondent.*

---

*Order.*

In the above entitled cause, the petitioner having moved to stay enforcement of order of commitment of the petitioner, pending the hearing on the resentence of said petitioner;

Now, upon the papers filed in relation to the motion, and the motion having been duly submitted and due deliberation having been had thereon, it is

Ordered that the motion is hereby denied.

Enter:

IRVING N. SELKIN
Clerk of Appellate Division

*Appendix C—Orders*

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on December 12, 1974.

Hon. Frank A. Gulotta,
Presiding Justice,
Hon. James D. Hopkins,
Hon. Henry J. Latham,
Hon. Arthur D. Brennan,
Hon. A. David Benjamin,
Associate Justices.

---

THE PEOPLE, etc.,

*Respondent,*

*v.*

ANTHONY HUESTON a/k/a Tony DeJeste and BONNIE KERR,

*Appellants.*

---

*Order.*

In the above entitled cause, appellant Anthony Hueston having moved for reargument of his appeal from a judgment of the County Court, Rockland County, rendered April 20, 1971 and to stay execution of the commitment order, pending determination of said appeal on reargument;

Now, upon the papers filed in support of and in opposition to the motion, and the motion having been duly submitted and due deliberation having been had thereon, it is

ORDERED that the motion is hereby denied, without prejudice to an application in the trial court in the nature of *coram nobis* pursuant to article 440 of the CPL.

Enter:

IRVING N. SELKIN
Clerk of Appellate Division

Received
Dec 19 1974
Dec 20 1974
Rockland County
District Attorney's
Office

## Appendix D—Orders to Show Cause.

COUNTY COURT OF THE STATE OF NEW YORK,

COUNTY OF ROCKLAND.

---

IN THE MATTER

of

The Application of BONNIE KERR,

*Petitioner,*

In the nature of a writ of error *Coram Nobis* for relief under Title M of the Criminal Procedure Law.

Indictment No.
69/71
69/72
Index No. 2843/69

---

*Order to Show Cause.*

Upon reading and filing the annexed affidavit of Bonnie Kerr, sworn to the 16th day of December, 1974, the affirmation of L. Rissier Bernard, sworn to the 16th day of December, 1974 and upon all the proceedings heretofore had in *People of the State of New York v. Anthony Hueston, also known as Tony de Jeste,*

LET the defendant, The People of the State of New York, by Honorable Robert R. Meehan, show cause at a Special Term of this Court, located at the County Courthouse, New City, State of New York, on the 18th day of December, 1974 at 4:00 o'clock in the afternoon of that day or as soon thereafter as counsel can be heard, why an order shall not be made in this action vacating the

sentence imposed upon Bonnie Kerr, after conviction, on the grounds that the sentence was unduly harsh, excessive and illegally imposed and otherwise invalid as a matter of law, and that a hearing *coram nobis* be held to determine whether the said Bonnie Kerr had counsel on her appeal adequate to protect her rights and whether due process was had under the Constitution of the United States, and for such other and further relief as to the Court may seem just and proper.

LET service of the within order to show cause upon the District Attorney of Rockland County on or before the 16th day of December, 1974, be deemed good and proper service.

Dated: December 16, 1974.

Enter,

HONORABLE ROBERT J. STOLARIK
*J. C. C.*

*Appendix D—Orders to Show Cause*

STATE OF NEW YORK, COUNTY COURT,

COUNTY OF ROCKLAND.

---

PEOPLE OF THE STATE OF NEW YORK,

*Plaintiff,*

*against*

ANTHONY HUESTON,

*Defendant.*

69-71
69-72

---

*Order to Show Cause.*

Present:

On the affirmation of Richard T. Monahan, attorney for defendant, and all proceedings heretofore had herein,

Now, on motion of Richard T. Monahan, attorney for defendant, let the People show cause at a Special Term, Part I hereof, to be held in and for the County of Rockland, at the County Courthouse, New York, on the 18th day of December, 1974, at 4 o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard, why an order should not be made vacating the sentence imposed after conviction upon the defendant, Anthony Hueston, on the ground that it was unduly harsh, excessive, unauthorized, illegally imposed, or otherwise invalid as a

matter of law, and that a hearing on *Coram Nobis* be held to ascertain whether the procedural steps of appeal on behalf of defendant provided adequate counsel and representation on behalf of Anthony Hueston, to protect his rights and due process under the Constitution of the United States, and for such other and further relief as the Court may deem just and proper. That personal service of a copy of this order be accomplished by 5:00 P.M. on Dec. 16, 1974.

Dated: December 13, 1974.

Enter

s/ ROBERT STOLARIK
*J. C. C.*

**Appendix E—Decision and Order.**

COUNTY COURT,

ROCKLAND COUNTY.

THE PEOPLE OF THE STATE OF NEW YORK

*against*

ANTHONY HEUSTON, also known as Tony DeJeste and BONNIE KERR,

*Defendants.*

Ind. No. 69-71
69-72

Hon. Kenneth Gribetz, District Attorney of Rockland County for the People.

Richard T. Monahan, Esquire, Attorney for Defendant Hueston.

Windheim, Bernard & Prindle, Esqs., Attorneys for Defendant Kerr.

ROBERT J. STOLARIK, County Judge:

This is a proceeding in the nature of an application for a writ of error *coram nobis* pursuant to Article 440 of the Criminal Procedure Law. Both defendants have retained individual counsel and have made separate application, but for the purposes of this decision, the application shall be considered as having been jointly made.

Defendant Hueston was convicted of Criminal Possession of a Dangerous Drug in the Fourth Degree, Criminal Possession of a Dangerous Drug in the Third Degree and Unlawfully Using Slugs in the Second Degree on April 20, 1971, and defendant Kerr was convicted of Criminal

Possession of a Dangerous Drug in the Fourth Degree and Criminal Possession of a Dangerous Drug in the Third Degree on April 20, 1971. These judgments of conviction were appealed to the Appellate Division, Second Department, where said judgments were set aside. On further appeal to the New York State Court of Appeals, the judgment of the Appellate Division was reversed and the judgments of conviction were restored.

The basis of defendants' present applications are (1) excessivity of sentence and (2) incompetence of counsel.

With regard to the defendants' contention of excessivity of sentence, the Court finds that defendants have failed to allege facts to show that the sentence was unauthorized, illegally imposed or otherwise invalid as a matter of law. (Criminal Procedure Law Section 440.20 Subd. 1). Accordingly, the application to set aside the sentence is denied.

With respect to the defendants' application as it pertains to the processing of their appeals and the adequacy of counsel in their prosecution, the Court is constrained to hold that the application to set aside the judgment must be denied pursuant to Criminal Procedure Law Section 440.10 subd. 2 (c) which provides in pertinent part that ". . . the Court must deny a motion to vacate a judgment when: . . . Although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's . . . unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him . . ."

On the face of the application there is nothing to indicate that defendants' present posture could not have been presented on appeal and considered at that time. A review of the trial transcript reveals possible error

which the defendants' trial attorney properly preserved for appeal and there is no basis for defendants' contention that trial counsel was incompetent. "There is a denial of effective representation of counsel only when the representation given is so patently lacking in competence or adequacy that it becomes the duty of the Court to be aware of it and correct it. Indeed, to hold otherwise would require a rule that a conviction must be vacated solely on the ground that assigned counsel was negligent or otherwise at fault in performing his duty." *People v. Tomaselli*, 7 N. Y. 2d 350, 356.

Defendants cite *People v. Callaway*, 24 N. Y. 2d 127 and *People v. Montgomery*, 24 N. Y. 2d 130, wherein the Court held that a defendant would be entitled to a resentencing to afford him an opportunity to prosecute and perfect an appeal where either the Court or the defendants' attorney failed to advise the defendant of his right to appeal. Defendants suggest that this doctrine be extended to include the instant case where the appeal was perfected and taken to the highest Court in this state on the sole issue that pretrial decisions of this Court were in error. Defendants argue that the attorney's failure to cite other grounds for appeal amounts to failure on the part of the defendants' attorney to advise the defendants of their appellate rights.

Defendants also argue that the appeal of this single issue by the defendants' former attorney amounted to an abandonment of appeals that had already been instituted. In *People v. Lampkins*, 21 N. Y. 2d 138, and *People v. DeRenzzio*, 14 N. Y. 2d 732, the Court remanded the question for a hearing to determine whether defendants had been unconstitutionally deprived of their rights to appeal where their attorneys had failed to prosecute appeals.

The Court finds that the above cases cited are not applicable to this situation where an appeal has been perfected and heard by both the Appellate Division and the

Court of Appeals. It is not the prerogative of the trial court to determine the competency of appellate counsel, but rather this determination must be made by the appellate courts. For this court to review the conviction in the manner suggested by defendants would be akin to assuming the prerogatives of an appellate court. The Court can find no justification in law under the facts presented in this application whereby this Court could assume such jurisdiction. Accordingly, the application to vacate the judgment is likewise denied.

The Court has reviewed the application and the law pertaining thereto most thoroughly, because in reviewing this petition, it would appear from the trial record that there was error regarding the admission of certain evidence which would not only present grounds for appeal, but, in this Court's opinion, might constitute reversible error. It would also appear that the record on trial was never reviewed on appeal due to the fact that the appeal was taken only from the pretrial decisions of this Court which denied the defendants' motions to suppress evidence obtained from intercepted telephonic communications and a subsequently issued search warrant based on information obtained from these intercepted communications. Accordingly, the appellate courts were never afforded the opportunity of reviewing the record on trial to discover possible errors therein.

While this Court finds no basis for relief in Article 440 of the Criminal Procedure Law, it would seem that defendants have a remedy available to them in the form of a motion to reargue the appeal. It is respectfully urged that the interests of justice and the fundamental principles of due process demand that such an application be made in the appropriate forum.

This decision shall constitute the order of the Court.

Dated: New City, New York
January 6, 1975

ROBERT J. STOLARIK
County Judge, Rockland County

## Appendix F—Order to Show Cause.

STATE OF NEW YORK,

APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT.

---

IN THE MATTER

of

The Application of BONNIE KERR,

For relief under Article 440 of the Criminal Procedure Law.

Appellate Division #4614
Ind. No. 69-71 & 72
Index #2843/69

---

Upon reading and filing the annexed affirmation of L. Rissier Bernard, dated said 8th day of January 1975, and upon all of the proceedings heretofore had in the above matter and in the case of People of the State of New York v. Anthony Hueston, aka Tony deJeste and Bonnie Kerr.

LET the defendant, The People Of The State Of New York, by Hon. Kenneth Gribetz, show cause at a Special Term of this Court, located at 45 Monroe Place, in the County of Kings, State of New York, on the 13 day of January 1975 at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order granting leave to renew and reargue defendant's

motion for a re-sentencing, or, in the alternative, to vacate the judgment, and it is

ORDERED that pending the determination of this motion, that the defendant, Bonnie Kerr, shall be admitted to bail.

LET service of the within order to show cause upon the District Attorney of Rockland County on or before the 8th day of January, 1975, be deemed good and proper service.

Dated: January 8, 1975

Enter

/s/ JAMES D. HOPKINS
Associate Justice, Supreme Court
Appellate Division Second Department

*Appendix F—Order to Show Cause*

**SUPREME COURT OF THE STATE OF NEW YORK,**

APPELLATE DIVISION—SECOND DEPARTMENT.

---

PEOPLE OF THE STATE OF NEW YORK,

*Plaintiff-Respondent,*

*against*

ANTHONY HUESTON, also known as Tony DeJeste and BONNIE KERR,

*Defendants-Appellants.*

---

*Order to Show Cause.*

Present:

Upon reading the annexed affirmation of Richard T. Monahan, and upon all the pleadings and proceedings heretofore had herein.

LET the District Attorney of Rockland County show cause at a motion term of the Supreme Court of the State of New York, Appellate Division, 2d Department, to be held at the Courthouse hereof, located at Monroe Place on the 13th day of January, 1975, at 9:30 o'clock on said day or as soon thereafter as counsel can be heard, why the defendant-appellant should not have argument of the appeal and why on such reargument this court should not modify the sentence or in the alternative set aside the judgment and why the defendant-appellant should not have such other, further and different relief as may be just and proper under the circumstances.

*Appendix F—Order to Show Cause*

Sufficient reason appearing therefor, let service of a copy of this order to show cause and the annexed affirmation of Richard T. Monahan, Esq., attorney for the plaintiff-respondent herein on or before the 8th day of January, 1975, be deemed sufficient for all purposes herein.

Dated: Brooklyn, New York
January 8, 1975

JUSTICE MARTUSCELLO
Associate Justice of the Appellate
Division Second Department

## Appendix G—Orders.

SUPREME COURT,

APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT.

Before:

Hon. James D. Hopkins, Associate Justice.

---

IN THE MATTER

of

BONNIE KERR,

*Petitioner,*

*v.*

HON. ROBERT R. MEEHAN, DISTRICT ATTORNEY, ROCKLAND COUNTY,

*Respondent.*

---

*Order.*

In the above entitled cause, the above named Bonnie Kerr, petitioner, having moved in this court for leave to appeal thereto from an order of the County Court, Rockland County, dated January 6, 1975; and this court, by order dated January 16, 1975, having referred said motion to me for determination;

Now, upon the papers filed in support of and in opposition to the motion, and the motion having been duly submitted and due deliberation having been had thereon, it is

ORDERED that the said motion for leave to appeal to this court is hereby granted.

Dated, Brooklyn, N. Y.,
January 22, 1975.

HON. JAMES D. HOPKINS,
Associate Justice, Appellate Division,
Supreme Court, Second Judicial Department.

*Appendix G—Orders*

SUPREME COURT,

APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT.

Before:

Hon. James D. Hopkins, Associate Justice.

---

THE PEOPLE, *etc.*,

*Plaintiff,*

*v.*

ANTHONY HUESTON a/k/a Tony DeJeste,

*Defendant.*

---

*Certificate Granting Leave to Appeal to Appellate Division.*

In the above entitled cause, the above-named Anthony Hueston a/k/a Tony DeJeste, defendant, having moved in this court for leave to appeal thereto from an order of the County Court, Rockland County, dated January 6, 1975; and this court, by order dated January 16, 1975, having referred said motion to me for determination;

Now, upon the papers filed in support of said application motion, and the papers filed in relation thereto, said motion having been duly submitted; and due deliberation having been had thereon; it is:

ORDERED that said motion for leave to appeal to this court is hereby granted.

Dated, Brooklyn, N. Y.,
January 22, 1975.

HON. JAMES D. HOPKINS,
Associate Justice, Appellate Division,
Supreme Court, Second Judicial Department.

Notice:

The defendant-appellant, within 15 days after the date hereof, must file, with the court which made the order sought to be appealed, a notice of appeal, in duplicate, and serve a copy of the notice of appeal upon the District Attorney (CPL 460.10, subds. 1, 4). An application for a transcript of minutes in question may be made to this court pursuant to CPL 460.70 (subd. 1) after the notice of appeal has been served and filed.

## Appendix H—Order to Show Cause.

IN THE

UNITED STATES DICTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

---

BONNIE KERR,

*Petitioner,*

*against*

RAYMOND A. LINDEMANN, SHERIFF OF THE COUNTY OF ROCKLAND,

*Respondent.*

74 Civ. 5264

---

*Order to Show Cause for a Writ of Habeas Corpus.*

Upon the annexed verified petition of Bonnie Kerr, duly sworn to the 3rd day of December, 1974, and the exhibits annexed thereto, for the issuance of a writ of habeas corpus and for release on bail or on her own recognizance pending the disposition of the said within petition for a writ of habeas corpus, it is

ORDERED that the Respondent Raymond A. Lindemann, Sheriff of the County of Rockland, show cause before this Court on the 6th day of December, 1974, at 2:30 o'clock in the afternoon of that day, in Room 705, at the United States Courthouse, Foley Square, in the City, County and State of New York, why a writ of habeas corpus should not issue herein as prayed for in the said annexed petition, and it is further,

*Appendix H—Order to Show Cause*

ORDERED that the personal service of a copy of this order, together with a copy of the annexed verified petition, exhibits and any and all supporting papers on which this order is granted, on Respondent Raymond A. Lindemann, or his attorney on or before December 4, 1974, at noon of that day, be deemed sufficient service.

Dated: New York, New York
December 3, 1974.

/s/ INZER B. WYATT
United States District Judge

*Appendix H—Order to Show Cause*

IN THE

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

---

BONNIE KERR,

*Petitioner,*

*against*

RAYMOND A. LINDEMANN, SHERIFF OF THE COUNTY OF ROCKLAND,

*Respondent.*

---

*Petition for Writ of Habeas Corpus.*

Petitioner's verified petition respectfully avers that:

1. The jurisdiction of this Court is invoked under 28 U.S.C. 2241 to release Petitioner from the custody of the Respondent, which custody is in violation of Petitioner's rights under the Constitution of the United States of America, including but not limited to The Fourth, Fifth and Fourteenth Amendments to said Constitution.

2. That your Petitioner Bonnie Kerr is a citizen of the State of New York and of the United States of America.

3. That on the 20th day of April, 1971, the County Court, County of Rockland, and State of New York, rendered a judgment convicting your Petitioner and a codefendant, one Anthony Hueston, of criminal possession of drugs in the third and fourth degrees. Defendant Hueston was additionally convicted of using slugs in the second degree. This judgment followed a jury trial. I was

sentenced to a term of one year and to a term of six months on the respective charges, the sentences to run concurrently. Prior to the rendering of said judgment of conviction, the County Court had made and entered two orders denying my applications to suppress certain evidence; the date of said orders being December 3, 1970, and March 1, 1971. It is this question of the suppression of evidence which is involved in this application.

4. That subsequently I appealed to the Appellate Division, Second Department, which reversed both the judgment of conviction and orders denying my motions to suppress, granted my motions to suppress, and remanded the case for a new trial in accordance with the decision. A copy of that decision of the Appellate Division, Second Department, which was reported at 347 N. Y. S. 2d 78, 42 App. Div. 860, is annexed to the verified petition and made a part hereof.

5. That it will be noted by the Court that the Appellate Division decision refers to the case of *United States v. Eastman,* 465 F. 2d 1057. In that case the very same eavesdropping warrant involved in my County Court state trial and reviewed by the Appellate Division was the subject of a motion to suppress. In *Eastman,* the District Court in Pennsylvania suppressed the evidence on the ground that the prosecution and/or police had not complied with law; and that ruling was affirmed by the Third Circuit (see citation above.) Referring to *Eastman,* the Appellate Division, Second Department stated:

> "For the reasons stated by the U. S. Court of Appeals therein, we think that the County Court erred in its denial of defendants' motion to suppress the communications intercepted pursuant to the eavesdropping warrant . . ."

6. That following the decision of the Appellate Division described above, the State obtained permission and appealed to the New York Court of Appeals; and the latter Court reversed the order of the Appellate Division, upholding the challenged eavesdropping warrant. A copy of that decision, reported at 356 N. Y. S. 2d 272, 34 N. Y. 2d 116, is annexed hereto and made a part hereof for the convenience of the Court. This Court will note that the Court of Appeals, at page 274, discusses the *Eastman* case, and stated as follows:

> "In *Eastman*, the United States Court of Appeals affirmed the decision of the District Court suppressing the evidence obtained as a result of the intercepted conversations. Though discussing several grounds for suppression, the *Eastman* court stated that 'the touchstone' of its decision was that the case was 'not one in which an inventory was delayed but rather (was) one in which specific provisions of Title III were deliberately and advertently not followed. In other words the failure to file the notice or inventory (was) no mere ministerial act. It resulted from a judicial act which on its fact deliberately flouted and denigrated the provisions of Title III designated for the protection of the public.'" 465 F. 2d at p. 1062

The Court of Appeals noted that the Appellate Division had adopted the reasoning of *Eastman*, but the Court went on to conclude that "with due respect for the authority of the *Eastman* case, we are not convinced that its reasoning should be followed." The United States Supreme Court has, upon information and belief, denied certiorari to your Petitioner, and no further appeal can be taken, thereby exhausting my remedies.

7. That Petitioner's detention by Respondent violates her rights under the Fourth, Fifth and Fourteenth Amend-

ments to the Constitution of the United States of America, in that

(a) the eavesdropping warrant discussed hereinabove was not made and executed in accordance with Federal and State Law governing the use of such warrants, as found by the District Court of the Middle District of Pennsylvania and as affirmed by the Third Circuit of the United States Court of Appeals.

(b) the use of such warrant in obtaining the judgment of conviction thereby violated your Petitioner's rights under the Fourth Amendment, in that it constituted an unlawful search and seizure.

(c) the failure of the prosecution and the law enforcement authorities to comply with Federal and States laws applicable to such warrants deprived your Petitioner of due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

8. That following the decision of the New York Court of Appeals I learned by hearsay that certiorari was denied by a Justice of the United States Supreme Court. Through all of the proceedings I have been represented by an attorney retained by my codefendant. I was then advised to surrender to the Sheriff of Rockland County, the Respondent herein, on Monday, December 2, 1974, which was yesterday. At that time my present attorneys, Windheim, Bernard & Prindle, of Nyack, New York, appeared at the County Court, Rockland County, together with the representatives of the District Attorney of Rockland County. Lorna Bernard, a member of the firm, made application for a stay of my surrender pending an application to the Court. However, the County Judge directed that I surrender on Tuesday, December 3, 1974 at one o'clock in the afternoon. The County Judge issued a bench warrant which is held in abeyance pending my surrender. This Petition is being submitted to this Court

after I have surrendered, and I am in the custody of the Respondent.

9. That no previous application to this Court or to any other State or Federal Court has been made for a writ of habeas corpus, or any similar relief.

WHEREFORE petitioner prays to this Court as follows:

(a) That a writ of habeas corpus issue forthwith directed to Respondent requiring him to produce the body of Petitioner this day;

(b) That Petitioner forthwith be released on bail or in her own recognizance pending disposition of this proceeding for a writ of habeas corpus;

(c) That Petitioner be restored to her liberty;

(d) That a hearing be held to examine all the records and proceedings in this case and to inquire into the cause of Petitioner's detention; and

(e) That Petitioner be granted such other and further relief as to this court may seem just and proper.

Dated: Nyack, New York
December 3, 1974.

Respectfully submitted,

s/ BONNIE KERR
Petitioner

## Appendix I—Decision, Hon. Inzer B. Wyatt.

BONNIE KERR,

*Petitioner,*

*v.*

RAYMOND A. LINDEMANN, SHERIFF OF THE COUNTY OF ROCKLAND,

*Respondent.*

74 Civ. 5264

This is an application for the writ of habeas corpus (28 U.S.C. §2241) by Bonnie Kerr, who is in the custody of respondent under a judgment of conviction of the Rockland County Court entered April 20, 1971. Kerr was found guilty by a jury of drug offenses, along with a co-defendant, Anthony Hueston, also known as Tony DeJeste.

An eavesdropping warrant was signed by a justice of the New York Supreme Court and telephone conversations were intercepted, but notice was not thereafter given as required by state and federal law. The defendants had actual notice, however, and timely motions to suppress were made.

For reasons to be explained, exactly the same issue has been considered by the United States Court of Appeals for the Third Circuit, which held that the interception was unlawful, and by the Court of Appeals of the State of New York, which held that the interception was lawful.

The conclusion of this Court is that the interception was lawful and that the present application must be denied.

*Appendix I—Decision, Hon. Inzer B. Wyatt*

1.

On June 2, 1969, Mr. Justice Hoyt of the New York Supreme Court in Rockland County signed an "eavesdropping warrant" directing that a wiretap be placed on the telephone line of applicant Kerr. This was done under the authority of provisions of the New York Code of Criminal Procedure (CCP; §§ 813-k, 514-825), replaced effective September 1, 1971, by the Criminal Procedure Law (the restating provisions being in Article 700 "Eavesdropping Warrants," §700.05 and following).

When Mr. Justice Hoyt signed the warrant the CCP (§823) required that, within 60 days of the "termination" of the warrant (or any renewals), written notice must be served on the person named in the warrant or on the telephone subscriber. This notice was required to be of the issuance of the warrant and of the period of authorized eavesdropping. Effective June 25, 1969, CCP §823 was repealed and replaced by a provision (CCP §822) requiring that the written notice must be given within 90 days (rather than 60, as theretofore). This was doubtless part of a purpose by New York to conform its wiretapping laws to those enacted by Congress in 1968.

When the warrant was signed on June 2, 1969, federal law (18 U.S.C. §2515) forbade the receipt in evidence in any federal or *state* court of any intercepted communication if its disclosure would be in violation of federal wire interception laws. Federal law (18 U.S.C. §2518(8)(d)) also required that within 90 days of the termination of an intercept order the judge must cause an "inventory" to be served on the persons named in the order. The inventory must include notice of entry of the order, the date of its entry, the period of authorized interception, and whether communications were or were not intercepted. Federal law (18 U.S.C. §2518(9)) also forbade the receipt in evidence in any federal or *state*

court of any intercepted communication unless, at least 10 days before the trial, each party has been furnished with a copy of the order and application therefor authorizing the interception. The judge may waive this 10 day period if he finds that it was not possible to comply with the 10 day rule and that the party is not prejudiced by delay.

A process copy of the June 2, 1969 warrant has been supplied. This indicates that the form of warrant was submitted with the application and that the Justice by hand filled in dates. The typed last sentence of the warrant reads:

> "That notice to the said Tony Dejeste and Bonnie Kerr is hereby expressly waived".

The period of the warrant was from June 2 to June 22, 1969. Apparently, at some time before June 22 the warrant was extended by order to July 10, 1969, at which time the period of authorized wiretapping expired.

There was a tap on Kerr's telephone during the authorized period and incriminating evidence was intercepted. On July 5, 1969, a search warrant was issued and on July 10, 1969, there was a search of Kerr's apartment under that warrant.

On August 12, 1969, a Rockland County Grand Jury returned an indictment charging Hueston and Kerr with drug offenses.

No notice was ever given to Kerr (or to Hueston) as required by New York law nor was any inventory ever served on them as required by federal law. Nevertheless they had actual notice of the wiretap warrant by at least September 26, 1969.

On papers dated September 26, 1969, counsel for defendants moved to obtain copies of the wiretap warrant and the papers on which it was based. Apparently this motion was denied by the Rockland County Court.

Defendants then secured new counsel and a second motion for discovery of the wiretap warrant and supporting papers were made. This motion was granted by the state court on March 17, 1970, and shortly thereafter counsel for defendants secured copies of these papers. It is represented that counsel also secured copies of the transcripts of the intercepted conversations.

Counsel for defendants then moved in Rockland County Court to suppress all evidence secured by the wiretaps, this because of the failure to give notice and to serve an inventory. The motion was denied by order entered December 3, 1970.

Counsel for defendants then moved to suppress all evidence secured under the search warrant, this because such warrant was based on intercepts under an illegal wiretap warrant. This motion was denied by order filed March 1, 1971.

Trial of defendants then took place in March 1971. The jury returned a verdict of guilty and on April 20, 1971, sentences were imposed and judgment of conviction entered in the Rockland County Court.

2.

Meanwhile, an indictment was returned against Hueston and Eastman (but not applicant Kerr) in the United States District Court for the Middle District of Pennsylvania. This was based in part on evidence secured under the two warrants executed in Rockland County.

A motion to suppress this evidence was made and on May 27, 1971 was granted by Judge Muir (*United States v. Eastman,* 326 F. Supp. 1038 (M.D. Pa. 1971)). The government appealed and on August 8, 1972, the order of Judge Muir was affirmed by the Court of Appeals for the Third Circuit (465 F. 2d 1057).

The federal indictment has since been dismissed.

3.

Kerr and her co-defendant then perfected their appeals from the Rockland County Court conviction.

On August 13, 1973, the Appellate Division, Second Department, reversed the judgment of conviction (42 A. D. 2d 860, 347 N. Y. S. 2d 78), accepting the opinion and conclusion of the Third Circuit Court of Appeals. Two justices dissented (with opinion).

On May 2, 1974, the Court of Appeals of New York unanimously reversed (34 N. Y. 2d 116, 356 N. Y. S. 2d 272), declining to follow the Third Circuit Court of Appeals. Judge Rabin wrote a persuasive opinion.

Kerr and her co-defendant are asking for a writ of certiorari from the United States Supreme Court, but there has been no decision as to this. A motion by Kerr and her co-defendant for a stay was denied by Mr. Justice Marshall on November 20, 1974. Applicant Kerr has surrendered and is in the custody of respondent.

4.

While it is theoretically possible that a writ of certiorari may be granted by the Supreme Court, Kerr has exhausted her remedies in the *state* courts and therefore may ask for relief here. 28 U.S.C. §2254(b); *Fay v. Moia,* 372 U. S. 391, 435-438 (1963).

5.

Admittedly there was no compliance with the notice requirements of New York and federal law. The persons whose telephone calls were intercepted had actual notice, however, and long before their trial had copies of the wiretap warrant, and search warrant, all supporting papers, and (it seems) transcripts of all intercepts. Their

motions to suppress were timely made and considered in the light of all this information. Failure to comply with the notice provisions after termination of the intercepts did not in this instance cause any prejudice to Kerr.

The wiretap warrant was not void on its face. It is not required that the warrant direct notice nor is it permitted to waive notice in the warrant. The *statutes*, not the warrants, require the giving of notice and nothing in the warrant can affect this protection to the parties and the public. The stated waiver in the warrant here (assuming that it was meant to refer to post termination notice) was a nullity. The intercepts were lawful when made because the warrant complied in all respects with the law.

The reasoning of the Third Circuit is that the waiver in the warrant was "a judicial act which on its face deliberately flouted and denigrated the provisions of Title III designated for the protection of the public." (465 F. 2d at 1062) This is too extreme a conclusion. The judge in signing the warrant did not himself insert the waiver; he accepted the form of warrant presented. It is by no means clear that the waiver of notice was meant to refer to the notice *after* termination. In the Appellate Division, the dissenting justices felt that the waiver referred to notice before or during interception. Whatever may be the proper interpretation, the terms of the warrant did not and could not affect the statutory requirements as to notice. The failure to observe those requirements caused no prejudice to Kerr because she had actual notice and her rights to move to suppress before trial were fully protected.

This Court is satisfied that the reasoning of the New York Court of Appeals is sound. The contrary conclusion of the Third Circuit Court of Appeals cannot be accepted.

There is no decision on the precise point by our Court of Appeals. It is noted, however, that where notice of intercepts was not given until six months after their termination, this delay was not found to make the interception unlawful. *United States v. Manfredi*, 488 F. 2d 588, 601-02 (2d Cir. 1973), cert. denied, 94 S. Ct. 2651 (June 3, 1974) The decision in *United States v. Rizzo*, 492 F. 2d 443, 447 (2d Cir.), cert. denied, 94 S. Ct. 3069 (June 10, 1974) seems also significant. There, the required notice was not given until one month after it should have been given. The Court of Appeals emphasized that it was "still five months before the suppression hearing" and that the "touchstone" was "prejudice to the defendant" (492 F. 2d at 447). Because no "actual prejudice" was claimed, the wiretap evidence was admitted. There is no claim of actual prejudice in the case at bar, nor could there be. The wiretap evidence was properly admitted against Kerr.

The application for a writ of habeas corpus is denied. Because of the conflict with the Third Circuit decision, a certificate of probable cause will issue (28 U.S.C. §2253).

So Ordered.

Dated: December 11, 1974

INZER B. WYATT
United States District Judge

## Appendix J—Notice of Appeal.

IN THE

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

---

BONNIE KERR,

*Petitioner,*

*against*

RAYMOND A. LINDEMANN, SHERIFF OF THE COUNTY OF ROCKLAND,

*Respondent.*

74 Civ. 5264

---

*Notice of Appeal.*

Name and Address of Appellant:

Bonnie Kerr, presently residing in the County Jail, County of Rockland, New City, New York.

Name and Address of Appellant's Attorneys:

Windheim, Bernard & Prindle, 145 Main Street, Nyack, New York, 10960.

An order dated December 11, 1974 denying an application for a writ of habeas corpus was served upon the undersigned attorneys for appellant on the 12th day of December, 1974. Said order granted a certificate of probable cause. The appellant had been convicted in the County Court, Rockland County, of criminal possession of dangerous drugs in the Third and Fourth Degrees. Ap-

peal was made to the Appellate Division of the Supreme Court of the State of New York, Second Department and to the New York Court of Appeals. Appellant was sentenced to one year in the County Jail on April 21, 1971.

The name of the institution where appellant is now confined:

Rockland County Jail, New City, New York.

The appellant herein, hereby appeals to the United States District Court for the Second Circuit from the above stated judgment.

Dated: Nyack, New York
January 13, 1975

WINDHEIM, BERNARD & PRINDLE
Attorneys for Petitioner
145 Main Street
Nyack, N. Y. 10960

To:

Diana Rivet,
County Attorney
County of Rockland
County Office Building
New Hempstead Road
New City, N. Y. 10956

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MICHAEL RODAK,

IN THE

# Supreme Court of the United States

No. 74-934

STATE OF NEW YORK,

Respondent,

-against-

ANTHONY HUESTON, also known as TONY DE JEST and BONNIE KERR,

Petitioners.

## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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## REPLY BRIEF

Respondent has adopted conflicting theories in their attempt to defeat the petition for a writ of certiorari. They state on the one hand that the petition is too late, claiming the 90-day period has run, and on the other hand that it is too early, claiming that petitioners have not exhausted their state remedies. In both instances they are wrong.

### POINT I

Respondents claim that petitioner's motion for a certificate for leave to further appeal to the Court of Appeals was a "vain act" may, with their "20-20 hindsight", be correct. It may also be correct that this petition could have been brought immediately after the decision of May 2, 1974 of the Court of Appeals because petitioners would not have been required to do a "vain act" in order to exhaust their state remedies. Nevertheless, the fact that *the petitioners* need not do what *the petitioners* can prove is a "vain act" is not the same as prohibiting them from doing what may later turn out to have been in vain. Petitioners had the right under § 460.20 of the New York Criminal Procedures Law to make the motion in the Court of Appeals. The Court of Appeals wasn't being asked to determine the facts but to determine the legal effects of the facts. This they had the power to do; and, indeed the Court of Appeals has in many instances reconsidered their interpretation of the law and reversed themselves. In fact, in *Dow v. Lorrenzo*, 18 N.Y. 2d 612, 272 N.Y.S. 2d 382, 18 N.Y. 2d 853, 275 N.Y.S. 2d 856, on a motion to reargue, the Court of Appeals unanimously reversed their previous unanimous decision.

Consequently, this petition is timely.

## POINT II

In Respondent's effort to prevent a hearing on the merits of the complex issues raised in the petition herein, they are willing even to distort the facts. Respondents know full well that from 1969 until November of 1974 one attorney represented both defendants, i.e., GEORGE BELLANTONI, the attorney who now only represents defendant HUESTON in this petition. There was no "piecemeal approach adopted by Petitioners". Rather, when both petitioners were represented by one attorney, the thrust of the appeals, to the exclusion of all other issues, was that the fruits of an eavesdropping warrant should be suppressed where the eavesdropping warrant contains a provision expressly waiving notice to the persons named in the warrant, contrary to the provisions of State and Federal statutes. *All State appeals have been exhausted with reference to this point.* If a petition had not been made within 90 days (as belabored by Respondent in his Point I) the petitioners would now be foreclosed to raise the serious questions contained in the petition. However, when defendant KERR retained new counsel in November 1974 she discovered that there were other issues. These issues are now the subject of an appeal to the Appellate Division from a decision and order of the County Court, Rockland County, of January 6, 1975 in which not only did the Court state that "there was error regarding the admission of certain evidence which * * * might constitute reversible error" but also found that:

> "It would also appear that the record on trial was never reviewed on appeal due to the fact that the appeal was taken only from the pretrial decisions of this Court which denied the defendants' motions to suppress evidence obtained from intercepted telephonic communications and

a subsequently issued search warrant based on information obtained from these intercepted communications. Accordingly, the appellate courts were never afforded the opportunity of reviewing the record on trial to discover possible errors therein."

These matters, now before the New York Courts, are not, however, the subject of the petition herein nor can they be. The reasons why they were not previously raised is a question now before the New York Courts. The subject matter of this petition, however, was raised and must be heard now or not at all. Unless the petition herein is granted, a "Catch 22" situation will result. And, a "Catch 22" situation is exactly what Respondent attempts here to create so that the issues raised by the direct conflict between the decisions of the Third Circuit Court of Appeals and the New York State Court of Appeals will not be resolved. Respondents prefer that the question not be resolved at all rather than risk an adverse decision — . Why?

## POINT III

Respondent's "Point III" supplies the answer to the question "Why?". The Respondent makes the accusation that to accept the "harsh construction" of the decision of the Third Circuit Court of Appeals (Appendix C) would attribute to a late and learned Justice of the New York Supreme Court "an utter disregard of the statutes in effect at the time." Such utter disregard was not attributed by Petitioners to Justice Hoyt. Did Justice Hoyt or his Clerk or law secretary prepare the orders? Of course not. The Respondent knew full well who prepared the orders authorizing eavesdropping warrants and to whom is attributed not only an utter disregard for the law but a calculated attempt to circumvent the law in which,

unfortunately, the late Justice Hoyt concurred. The petition specifically states in the reasons given for granting the writ that:

> "Prosecutorial officers must adhere to the statute to safeguard individuals privacy as must the courts. The joining of the Court with the prosecutor to circumvent the statute should not be permitted else other overzealous officials be encouraged not only to continue this type of circumvention but find other and different ways to circumvent the statutes."

Respondent also claims that the point that the Youman's warrant similarly circumvented the law and thus tainted the warrant herein was "injected into the case for the first time" in the instant petition, despite the fact that the point was raised not only in both the Appellate Division and Court of Appeals in New York but was also raised in the Pennsylvania case both in the Court of Appeals for the Third Circuit and the District Court.

The balance of Respondents' "Point III" and their "Point IV" attempts to convince this Court of the merits of their position. They should be granted an opportunity to do so. The granting of this petition would avail them of this opportunity.

Respectfully submitted,

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